Office - Supreme Court, U.S.
FILED
JUN 17 1957
JOHN T. FEY, Clerk

No. [redacted] 198

INDEX VOLUME.

TRANSCRIPT OF RECORD.

UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT.

No. 15,954

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, ET AL.,

Appellants & Cross-Appellees,

versus

CITY OF EL PASO,

Appellee & Cross-Appellant,

(AND REVERSE TITLE).

Appeal & Cross-Appeal from the United States District Court for the Western District of Texas.

(ORIGINAL RECORD RECEIVED FEB. 16/56.)

INDEX

VOLUME I.

	PAGE
Appellants' Designation as to Printing Record	1
Appellee's Designation as to Printing Record	7
Joint Stipulation of Counsel as to Payments of Cost of Appeal, etc.	11
Caption	13
Amended Complaint	13
Amended Answer and Counterclaim of Defendant to Amended Complaint	51
Reply of Plaintiffs' to Counterclaim of Defendant	76
Transcript of Evidence	79
Case called for Trial without a Jury (Omitted)	79
Colloquy between Court and Counsel (Omitted)	79
Excerpts from the Report of the Rio Grande Joint Investigation (Omitted)	79
Exhibit P-1-A—Letter, Dept., of the Interior, U. S. Geological Survey, Reclamation Service to David L. White, Territorial Irrigation Engineer, dated 1/23/06	80
Letter, Louis C. Hill, Supervising Engineer to Vernon L. Sullivan, Territorial Engineer, dated April, 1908	82
Exhibit P-2—Section 22 of Chapter 102, Laws of 1905, 36th Legislative Assembly of the Territory of New Mexico	84
Section 40 of Chapter 49, Laws of 1907, 37th Legislative Assembly of the Territory of New Mexico	85
Exhibit P-3—Photostat of—Convention between United States and Mexico, May 21, 1906	87
Exhibit P-4—"U. S. Certified Filing No. 123" with the Board of Water Engineers of the State of Texas, dated 5/18/14	91

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Exhibit P-4—(Continued):
Exhibit "A"—Photostat of Map 103
Exhibit "B"—Photostat of Map 104
Photostat of Map (RG264) 105
Water Users on Franklin Canal—Season of 1913 106
Exhibit P-5—Order of Commissioners' Court of El Paso County, Texas, dated 5/22/17 ... 126
Exhibit P-6—Order of Commissioners' Court of El Paso County, Texas, dated 2/10/19 .. 140
Exhibit P-7—Minutes of Special Meeting of the Board of Directors of El Paso County Water Improvement District No. 1, held 8/27/20 147
Minutes of Special Meeting of the Board of Directors of El Paso County Water Improvement District No. 1, held on 10/1/20 154
Minutes of Joint Special Meeting of the Board of Directors of El Paso County Water Improvement District No. 1, held on 10/1/20 158
Minutes of Special Meeting of the Board of Directors of El Paso County Conservation and Reclamation District No. 2, held on 8/28/20 163
Memorandum of Agreement between El Paso Water County Improvement District No. 1 and the El Paso County Conservation and Reclamation District No. 2, dated 8/27/20 164

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Exhibit P-7—(Continued):
Minutes of Special Meeting of the Board of Directors of El Paso County Conservation and Reclamation District No. 2, held on 9/30/20 171
Exhibit P-8—Rio Grande Compact of March 18, 1938 175
Exhibit P-9—Water Appropriation for the El Paso Irrigation Canal made by A. M. Loomis, etc., 1889 (Omitted) 194
Exhibit P-10—Amended Appropriation of El Paso Irrigation Canal dated July 29, 1889, by Loomis and others (Omitted) .. 194
Exhibit P-11—Deed from A. M. Loomis, et al., to El Paso Irrigation Company, dated 8/1/1889 195
Exhibit P-12—Deed from W. W. Turney, Master Commissioner to Thomas Worthington, dated 4/9/1898 198
Exhibit P-13—Deed from Thomas Worthington to the Franklin Irrigation Company, dated 6/16/1898 208
Exhibit P-14—Warranty Deed from Franklin Irrigation Company to United States of America, dated 10/14/12 214
Exhibit P-15—Sections of the City Charter, City of El Paso, Texas 227
Exhibit P-16—Ordinance of the City of El Paso, dated 9/5/39 235
Exhibit P-17—Ordinance of the City of El Paso, dated 11/9/39 239

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Exhibit P-18—Quit Claim Deed from the City of El Paso to the United States of America, dated 11/9/39 245
Exhibit P-19—Proceedings in Case, Francisco Mendoza vs. City of El Paso, Texas, Forty First Judicial District, No. 53430 .. 250
Plaintiff's Original Petition 250
Defendant's Answer and Plea in Abatement to Original Petition 257
Exhibit (not marked)—Quitclaim Deed from City of El Paso to United States of America, dated 8/31/39 257
Exhibit (not marked)—Quitclaim Deed from City of El Paso to United States of America, dated 9/5/39 265
Defendant's Plea in Abatement and First Amended Original Answer 271
Exhibit "A"—Quitclaim Deed from The City of El Paso, to United States of America, dated 11/9/39 279
Exhibit "B"—Amended Ordinance of the City of El Paso, passed on 11/9/39 283
Defedant's First Amended Original Answe: 288
Plaintiff's First Amended Original Petition 298
Exhibit P-20—Contract between United States of America and the El Paso County Water Improvement District No. 1, dated 1/17/20 298

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):

Exhibit P-21—Decree of Adjudication and Authorization of Contract with the United States, dated 5/6/18, in case entitled "In the Matter of the Organization of the Elephant Butte Irrigation District, etc.," In the Third Judicial District Court of the State of New Mexico, No. 4426 311

Exhibit P-22—Contract between the United States and El Paso County Water Improvement District No. 1, dated 10/12/22, Supplementary to Contract of 1/17/20 .. 331

Exhibit P-23—Contract between United States and El Paso County Water Improvement District No. 1, dated 11/10/37 337

Exhibit P-24—Decree, dated 3/8/54, approving Elephant Butte Irrigation Contract of 11/9/37; with the United States in the Third Judicial District Court of the State of New Mexico, No. 8508 360

Exhibit P-25—Judgment entered 4/4/21 in case entitled "Ex Parte El Paso County Water Improvement District No. 1", No. 19,944—65th Judicial District Court of El Paso County, Texas 391

Exhibit P-26—Judgment entered 11/8/39 in case entitled "Ex Parte El Paso County Water Improvement District No. 1", No. 46,742—41st Judicial District Court County of El Paso County, Texas 395

Exhibit P-27—Contract between United States and City of El Paso and El Paso Water Improvement District No. 1, dated 2/18/41 400

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Exhibit P-27—(Continued):
Resolution of the City Counsel of the City of El Paso, adopted at a regular Meeting of the City Council on 2/27/41 ... 422
Portion of the Minutes of the Meeting of the Board of Directors of El Paso Water Improvement District No. 1, held on 3/1/41 423
Resolution adopted at a Special Meeting of the Board of Directors of the Elephant Butte Irrigation District held on 3/3/41 424
Exhibit P-29—Contract between United States of America, and The City of El Paso, et al., dated 12/1/44 426
Resolution of the City Council of the City of El Paso, Texas, adopted at Regular Meeting of the City Council on 12/7/44 444
Resolution of the Board of Directors of the Elephant Butte Irrigation District of New Mexico, adopted on 1/2/45 at the Regular Meeting of the Board 445
Exhibit P-31—Application of the City of El Paso to the Texas State Board of Water Engineers, No. 1584, dated 9/23/48 447
Application of Mayor, City of El Paso for permit to appropriate, Store and Divert Certain Waters of the State of Texas, dated 9/23/48 448
Resolution passed by the City Council of the City of El Paso, on 9/23/48 454

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Exhibit P-31—(Continued):
Letter, El Paso Water Improvement District No. 1, et al., to the Board of Water Engineers, Austin, Texas, not dated 455
Letter, Jones, Hardie, Grambling & Howell, Attys., to Board of Water Engineers, Austin, Texas, dated 12/10/48 469
Photostat of Signatures of Owners and number of Acres owned by each 472
Letter, Jones, Hardie, Grambling & Howell, Attys., et al., to Board of Water Engineers, Austin, Texas, dated 12/11/48 473
Application of the City of El Paso No. 1584, to the Texas Board of Water Engineers, Austin, Texas, dated 12/1/49 477
Contract between the City of El Paso and El Paso County Water Improvement District No. 1, dated 8/10/49 485
Resolution adopted by The City Council of the City of El Paso, on 8/9/49 491
Excerpt from Minutes of Meeting of the Board of Directors of El Paso County Water Improvement District No. 1, held on 8/5/49 492
Letter, J. A. Krug, Secretary of the Interior addressed to "My Dear Mr. Harwell," dated 9/23/49 493
Letter, J. A. Krug, Secretary of the Interior addressed to "My Dear Mayor Duke," dated 9/23/49 496

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Exhibit P-31—(Continued):
Excerpts from Minutes of Meeting of the Board of Directors of El Paso County Water Improvement District No. 1, held on 9/30/49 499
Letter, H. E. Robbins, Regional Director to Hon. Dan Duke, Mayor City of El Paso, dated 10/5/49 503
Permit No. 1535 issued by the Board of Water Engineers of the State of Texas to Appropriate Public Waters of the State of Texas, dated 5/10/50 504
Exhibit P-32—Contract between The City of El Paso and El Paso County Water Improvement District No. 1, dated 8/10/49 509
Resolution adopted by the City Council of the City of El Paso, on 8/9/49 515
Excerpts from Minutes of Meeting of Board of Directors of El Paso County Water Improvement District No. 1, held on 8/5/49 516
Letter, J. A. Krug, Secretary of the Interior to Roland Harwell, General Mgr., El Paso County Water Improvement District No. 1, dated 9/23/49 517
Letter, J. A. Krug, Secretary of the Interior addressed "My Dear Mayor Duke," dated 9/23/49 520
Excerpts from Minutes of Meeting of the Board of Directors of El Paso County Water Improvement District No. 1, held on 9/30/49 523

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Exhibit P-32—(Continued):
Resolution adopted by the City Council of the City of El Paso, on 9 28 49 525
Exhibit P-33—Stipulation relative to the City of El Paso seeking a Permit, etc., dated 12/1/49 528
Exhibit P-34—Agreement between The City of El Paso and El Paso County Water Improvement District No. 1, dated 6 22 50 536
Resolution adopted by the Board of Directors of El Paso County Water Improvement District No. 1, dated 7 5 50 .. 537
Resolution adopted by the City Council of the City of El Paso, on 6 22 50 539
Excerpts from Deposition of Mayor, Fred T. Hervey 539
Plaintiffs' Request for Admission of Facts and Defendant's Answers thereto 577
Plaintiffs' Requests for Admission of Genuineness of Documents 604
Evidence for Plaintiffs:
Testimony of W. F. Resch 611
Exhibit P-35—Photostat of Map showing boundaries of El Paso County Water Improvement District No. 1 615
Exhibit P-35(a)—Contract between The United States and Hudspeth County Conservation and Reclamation District No. 1, dated 12/1/24 618

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Plaintiffs—(Continued):
Exhibit P-35(a)—(Continued):
Minutes of Meeting of Board of Directors of Hudspeth County Conservation and Reclamation District No. 1, held on 12/1/24 625
Photostat of Statement and Certificate of Award, dated 4/27/51 (Omitted) 626
Amendatory Contract between United States of America and Hudspeth County Conservation and Reclamation District No. 1, dated 4/27/51 for Rental of Water by Hudspeth County Conservation and Reclamation District No. 1 627
Resolution adopted by Hudspeth County Conservation and Reclamation District No. 1, on 4/19/41 636
Exhibit P-36—Photostats of Graphs of discharge of Rio Grande at El Paso for years 1889 to 1951 640
Exhibit P-37—Photostats of Graphs of discharge of Rio Grande at San Marcial for years 1895 to 1951 .. 650
Exhibit P-87(a)—Table showing land subject to repayment of construction charges, etc. 690

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Plaintiffs—(Continued):
Exhibit P-87(a)—(Continued):
Exhibit P-87(b)—Table showing Rio Grande Project Acreage irrigated from 1915 to 1953 693
Exhibit P-106(a)—Photostat of General Map—Anthony to El Paso 708
Exhibit P-88—Letter, W. F. Resch, Project Mgr., to Harlan Hugg, General Mgr., Dept., of Water & Sewerage, dated 9/12/52 717
Exhibit P-89—Letter, W. F. Resch, Project Mgr., to Harlan Hugg, General Mgr., Dept., of Water & Sewerage, dated 9/12/52 719
Exhibit P-90—Letter, Public Service Board to W. F. Resch, Project Mgr., dated 9/16/52 721
Exhibit P-91—Letter, N. B. Phillips, Mgr., to Harlan Hugg, dated 9/16/52 722
Exhibit P-92—Letter, W. F. Resch, Project Mgr., to Harlan Hugg, General Manager, dated 9/23/52 725
Exhibit P-100—Letter, J. H. Tillman, Sanitary Engineer to W. F. Resch, dated 9/29/53 731

VOLUME II.

Exhibit P-107—Extracts from Brochure of City of El Paso 742

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Plaintiffs—(Continued):
Exhibit P-107—(Continued):
Exhibit P-107(a)—Photostat of Greater El Paso (Omitted) 744
Exhibit P-109—Joint Resolution of the Senate and House of Representatives of 2/13/35, Public Resolution No. 4 (Omitted) 750
Testimony of J. F. Friedkin 750
Exhibit P-110—Photostats of Canalization (Three Maps) 753
Exhibit P-111—Photostats of List of Deeds & Condemnation suits (4 Sheets) 761
Exhibit P-110(a)—36 Status (NM Enabling Act) 765
Exhibit P-112—Photostat of River Rectification Project (14) 767
Exhibit (not marked)—Cession Act of 1934 of the 43rd Legislature of the State of Texas 787
Testimony of W. F. Resch (Recalled) 809
Exhibit "D-1"—Ordinance adopted by The City Council of the City of El Paso on 9/16 1889 852
Exhibit "D-2"—Amendment of Ordinance adopted by The City Council of El Paso on 12/11/13 855
Testimony of N. B. Phillips 915
Exhibit P-115—Letter, Ashley G. Classen, Supt., to Roland Harwell, Mgr., dated 7/28/41 922

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Plaintiffs—(Continued):
Testimony of N. B. Phillips—(Continued):
Exhibit P-116—Letter, Roland Harwell, Mgr., to Ashley G. Classen, Supt., Dept., of Water & Sewerage, dated 8/4/41 923
Exhibit P-117—Letter, R. F. Momsen, Asst., City Atty., to El Paso County Water Improvement District No. 1, dated 2/11/42 925
Exhibit P-118—Letter, Roland Harwell, Mgr., to R. F. Momsen, Asst., Atty., City of El Paso, dated 2/12/42 926
Exhibit P-119—Letter, R. F. Momsen, Asst., City Atty., to Roland Harwell, dated 8/28/42 927
Exhibit P-120—Letter, Roland Harwell to R. F. Momsen, Asst., City Atty., dated 9/10/42 928
Exhibit P-121—Letter, R. F. Momsen, Asst., City Attorney to El Paso County Water Improvement District No. 1, dated 9/18/42 929
Exhibit P-122—Letter, Roland Harwell, Mgr., to R. G. Momsen, Asst., City Atty., dated 9/25/42 930
Exhibit P-123—Letter, R. F. Momsen, Asst., City Atty., to El Paso County Water Improvement District No. 1, dated 10/5/42 931

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Plaintiffs—(Continued):
Testimony of N. B. Phillips—(Continued):
Exhibit P-124—Letter, R. F. Momsen, Asst., City Atty., to El Paso County Water Improvement District No. 1, dated 10/26/42 932
Exhibit P-125—Letter, Roland Harwell, Mgr., to R. F. Momsen, Asst., City Atty., dated 11/5/42 933
Exhibit P-126—Letter, R. F. Momsen, Asst., City Atty., to El Paso County Water Users Assn., dated 12/22/42 935
Exhibit P-127—Letter, R. F. Momsen, Asst., City Atty., to El Paso County Water Improvement District No. 1, dated 1/4/43 936
Exhibit P-128—Letter, Roland Harwell to R. F. Momsen, Asst., City Atty., dated 1/6/43 937
Exhibit P-129—Letter, R. F. Momsen, Asst., City Atty., to Rowland Harwell, dated 1/13/43 938
Exhibit P-130—Letter, R. F. Momsen, Asst., City Atty., to Rowland Harwell, dated 1/15/43 939
Exhibit P-131—Letter, R. F. Momsen, Asst., City Atty., to Roland Harwell, dated 1/27/43 940
Exhibit P-132—Letter, Roland Harwell, Mgr., to R. F. Momsen, Asst., City Atty., dated 2/5/43 941

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Plaintiffs—(Continued):
Testimony of N. B. Phillips—(Continued):
Exhibit P-133—Letter, R. F. Momsen, Asst., City Atty., to Roland Harwell, dated 2/2/43 942
Exhibit P-134—Letter, Roland Harwell to R. F. Momsen, Asst., City Atty., dated 2/22/43 943
Exhibit P-135—Letter, R. F. Momsen, Asst., City Atty., to El Paso County Water Improvement District No. 1, dated 5/20/43 944
Exhibit P-136—Letter, Ashley G. Classen, Supt., to El Paso County Water Improvement District No. 1, dated 11/10/43 945
Exhibit P-137—Letter, Ashley G. Classen, Supt., to El Paso County Water Improvement District No. 1, dated 1/12/44 948
Exhibit P-138—Letter, Roland Harwell, General Mgr., to Supt., U. S. Bureau of Reclamation, Rio Grande Project, not dated with Schedule showing the acquired lands herein covered, etc., attached 949
Exhibit P-139—Resolution passed by the City Council of the City of El Paso, on 1/14/44 951
Power of Attorney from the City of El Paso, Texas to El Paso County Water Improvement District No. 1, dated 1/14/44 .. 952

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Defendant—(Continued):
Testimony of N. B. Phillips—(Continued):
Contract between United States of America and The City of El Paso, dated 2/18/41 to supply water to the City of El Paso for Municipal Purposes 955
Exhibit P-140—Letter, R. F. Momsen, Asst., City Atty., to El Paso County Water Improvement District No. 1, dated 5/22/45 975
Exhibit P-141—Letter, Roland Harwell, General Mgr., to R. F. Momsen, Asst., City Atty., dated 6/12/45 977
Exhibit P-142—Letter, R. F. Momsen, Asst., City Atty., to El Paso County Water Improvement District No. 1, dated 4/14/44 978
Exhibit P-143—Letter, Roland Harwell, General Mgr., to R. F. Momsen, Asst., City Atty., dated 5/15/44 979
Exhibit P-144—Letter, Roland Harwell, General Mgr., to R. F. Momsen, Asst., City Atty., dated 6/27/44 980
Exhibit P-145—Letter, R. F. Momsen, Asst., City Atty., to El Paso County Water Improvement District No. 1, dated 7/5/45 981
Exhibit P-146—Letter, Roland Harwell, General Mgr., to R. F. Momsen, Asst., City Atty., dated 7/6/45 .. 982

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Plaintiffs—(Continued):
Testimony of N. B. Phillips—(Continued):
Exhibit P-147—Letter, R. F. Momsen, Asst., City Atty., to El Paso County Water Improvement District No. 1, dated 7/10/45 983
Exhibit P-148—Letter, Reuben F. Momsen, Asst., City Atty., to El Paso County Water Improvemen. District No. 1. dated 8 17 45 984
Exhibit P-148(a)—Statement Water Charges for 1951 El Paso County Water Improvement District No. 1. dated 11/1/51 988
Exhibit P-148(b)—Statement Water Charges for 1952 El Paso County Water Improvement District No. 1, dated 10/6/52 989
Exhibit P-148(c)—Statement Water Charges for 1953 El Paso County Water Improvement District No. 1. dated 10/14/53 990
Exhibit P-148(d)—Statement Water Charges for 1954 El Paso County Water Improvement District No. 1. dated 10/10/53 991
Exhibit P-148(e)—Photostat of Additional Water Statement Charges for 1953 El Paso County Water Improvement District No. 1. dated 10/14/53 992

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Plaintiffs—(Continued):
Testimony of N. B. Phillips—(Continued):
Exhibit P-148(f)—Photostats of Inventory of Taxable Property 1954 El Paso County Water Improvement District No. 1 995
Testimony of Raymond A. Hill 1078
Exhibit P-151—Photostat of Graph entitled "Annual Discharge of Rio Grande at San Marcial and Periods of Low Flow in Rio Grande above El Paso 1089
Exhibit (not marked)—Portion of the Treaty between the United States and Mexico, signed on 2/3/44 (Omitted) 1107
Exhibit P-151(a)—Contract between United States of America and El Paso Electric Company, dated 5/26/32 (Omitted) 1103
Extract from Minutes of Special Meeting of the Board of Directors of the El Paso County Water Improvement District No. 1, held on 4/15/32 (Omitted) 1108
Extract from Minutes of Regular Meeting of the Board of Directors of the Elephant Butte Irrigation District held on 4/5/32 (Omitted) 1108
El Paso Electric Company (Texas) Transcript from Records of Board of Directors, (Omitted) 1108

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Plaintiffs—(Continued):
Testimony of N. B. Phillips—(Continued):
Testimony of Spencer L. Baird 1108
N. B. Phillips (Recalled) 1113
Evidence for Defendant:
Testimony of Robert L. Lowry 1118
Haskell R. Street 1146
Exhibit D-19—Photostat of Figures on amount of water through meter at water treatment plant 1152
Exhibit D-20—Table of Figures on Effluent from Sewage Plant in Acre Feet 1154
Exhibit D-29—Photostat of Tabulation of water metered from the river and amounts pumped from the canal, etc. 1160
Testimony of Harlan H. Hugg 1165
Exhibit D-30—Photostat of Drawing indicating relative positions of various physical objects from American Dam to Santa Fe Street Bridge 1169
Exhibit D-32—Table of percentage of water, etc. 1173
Exhibit D-33—Data on Population 1177
Exhibit D-34—Letter from Secretary of Board of Water Engineers to Harlan H. Hugg, dated 3/25/53 1179
Exhibit D-35—Order of Board of Water Engineers, dated 5/5/52 1182

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Defendant—(Continued):
Testimony of Wyatt Richards 1198
Lowdon Wingo, Jr. 1206
Joseph Nadon, Jr. 1211

VOLUME III.

Mayor Fred Hervey 1227
Nicolas Perez, Jr. 1238
Exhibit D-49—Photostat of Plat of El Paso by Anson Mills, 1859 1246
Exhibit D-50—City Ordinance of May 1, 1874 1247
Exhibit D-51—Act to Incorporate City of El Paso, 1873 1250
Exhibit D-52—Act to Encourage Irrigation, 1874 (Omitted) 1300
Exhibit D-53—Ordinance of City of El Paso of 8/25/1873 1301
Exhibit D-54—City Ordinance of Oct. 23, 1873 1303
Exhibit D-55—Resolution of November 14, 1874 1309
Exhibit D-56—City Ordinance of March 5, 1875 1312
Exhibit D-57—City Ordinance of August 28, 1875 1315
Exhibit D-58—City Ordinance of August 10, 1875 1318
Exhibit D-59—City Ordinance of Sept. 11, 1875 1320
Exhibit D-60—City Ordinance of August 3, 1880 1322

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Defendant—(Continued):
Testimony of Wyatt Richards—(Continued):
Exhibit D-61—City Ordinance of August 21, 1880 1324
Exhibit D-62—Petition of Charles R. Morehead, et al., reference to franchise for El Paso Water Company, 4/14/1881 1327
Exhibit D-63—Ordinance of May 7, 1881 1333
Exhibit D-64—Act of March 2, 1889, Texas Legislature, granting a new charter to City of El Paso .. 1335
Exhibit D-65—Act of March 19, 1889, Irrigation 1416
Exhibit D-66—Resolution of City Council, October 25, 1889 1423
Exhibit D-67—Ordinance of June 28, 1890 1428
Testimony of Raymond L. Telles, Jr. 1432
Exhibit D-71—Act of El Paso Commission Court, June 13, 1888 (Omitted) 1441
Exhibit D-73—Ordinance No. 10, December 6, 1893 (Omitted) 1441
Exhibit D-74—Ordinance of the Town of Socorro, February 14, 1887 (Omitted) 1442
Exhibit D-68—Ordinance of February 7, 1890 1442
Exhibit D-69—Ordinance of May 16th, 1890 1444

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Defendant—(Continued):
Testimony of R. L. Telles, Jr.—(Contd):
Exhibit D-75—Water Consumption Tax Receipt 1449
Portion of Treaty between United States and Mexico, 2/2/1848.. 1453
Testimony of W. F. Resch (Recalled) 1455
Evidence for Plaintiffs (In Rebuttal):
Testimony of Laurence E. Stevens 1459
Exhibit P-107—Development of the Water and Sewer System 1464
Testimony of Raymond A. Hill (Recalled) 1467
Evidence for Defendant:
Testimony of Nicolas Perez, Jr. 1493
W. F. Resch (Recalled) 1499
Evidence for Plaintiffs:
Testimony of W. F. Resch (Recalled) 1505
Evidence for Defendant:
Testimony of Harlan H. Hugg 1522
Haskell R. Street 1530
Exhibit D-77—Figures on water, etc. .. 1535
Testimony of Haskell R. Street (Recalled) 1545
Robert L. Lowry 1557
Exhibit D-78—Figures on discharge of riverside canal, etc. 1564
Exhibit D-79—Figures on El Paso Sewage Outfall 1939 to 1954 1568
Exhibit D-80—Annual Figures on pattern of river operation 1576
Testimony of N. B. Phillips (Recalled) ... 1581
Everett J. Bradt 1590
W. F. Resch 1592

INDEX—Continued

	PAGE
Transcript of Evidence—Continued):	
Evidence for Defendant:	
Testimony of R. L. Lowry (Recalled)	1653
Harlan H. Hugg (Recalled)	1654
Opinion of the Court	1658
Judgment, entered 8/1/55	1731
Motion of Defendant to Correct Judgment	1744
Motion of Plaintiffs to Alter or Amend Judgment	1746
Amended and Corrected Judgment, entered 9/28/55	1752
Notice of Appeal	1765
Notice of Cross-Appeal	1770
Appeal Bond by Appellants other than the United States	1771
Appeal Bond by City of El Paso, Appellee & Cross-Appellant	1773
Designation of Points on Appeal by Appellants and Cross-Appellees, El Paso County Water Improvement District No. 1, et al.	1774
Designation of Points on Appeal by City of El Paso, Appellee & Cross-Appellant	1781
Order entered 12/2/55 Transmitting Original Exhibits to Appellate Court	1785
Agreement of Counsel as to Transcript of Record	1788
Order entered 12/16/55 extending time to file Record in Appellate Court	1810
Clerk's Certificate	1812

Office - Supreme Court, U.S.
FILED
JUN 17 1957
JOHN T. FEY, Clerk

No. [redacted]198

VOLUME I.

TRANSCRIPT OF RECORD.

UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT.

No. 15,954

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, ET AL.,

Appellants & Cross-Appellees,

versus

CITY OF EL PASO,

Appellee & Cross-Appellant,

(AND REVERSE TITLE).

Appeal & Cross-Appeal from the United States District Court for the Western District of Texas.

(ORIGINAL RECORD RECEIVED FEB. 16/56.)

APPELLANTS' DESIGNATION AS TO PRINTING RECORD.

Filed February 20, 1956.

No. 15954.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, L. D. McCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BRIGGS, W. L. SUMMERS, AND THE UNITED STATES OF AMERICA,

Appellants,

versus

CITY OF EL PASO,

Appellee.

All appellants, as named above, pursuant to Rule 23, Paragraph 1, of the Rules of ths Court, request that only the followng designated portions of the record be printed, and photostats of Exhibits made where Exhibits are in photostat form in transcript of record sent up by District Clerk:

Item		Page of Transcript of Record
1.	Caption of Case.	1
2.	All pleadings of both plaintiffs and defendant.	2- 66

Item		Page of Transcript of Record
3.	That part of Plaintiffs' Exhibit 1-a which was copied into the record, being letter dated Jan. 23, 1906, and letter dated Apr. .., 1908.	82- 87
4.	Plaintiffs' Exhibit 2.	88- 90
5.	Plaintiffs' Exhibits 4, 5, 6, 7 & 8	96- 198
6.	Plaintiffs' Exhibits 11, 12, 13, 14, 15 and 16.	208- 257
7.	Plaintiffs' Exhibit 17.	259- 265
8.	Plaintiffs' Exhibit 18.	267- 272
9.	Plaintiffs' Exhibit 19.	278- 332
10.	Plaintiffs' Exhibit 20.	334- 346
11.	Plaintiffs' Exhibit 21.	348- 372
12.	Plaintiffs' Exhibit 22.	375- 381
13.	Plaintiffs' Exhibits 23, 24, 25 and 26.	383- 449
14.	Plaintiffs' Exhibit 27.	452- 478
15.	Plaintiffs' Exhibit 29.	481- 501
16.	Plaintiffs' Exhibit 31.	516- 581
17.	Plaintiffs' Exhibits 32, 33 & 34.	585- 616
18.	Testimony of Mayor Fred T. Hervey by deposition.	619- 663
19.	Plaintiffs' Requests for Admissions of Fact under Rule 36 and Defendant's Answer, and Plaintiffs' Requests for Admission of Genuineness of Documents and Defendant's Answers.	663- 697
20.	Testimony of W. F. Resch, including Plaintiffs' Exhibits 35, 35a (omitting printed form 1036	

Item		Page of Transcript of Record
	"Statement and Certificate of Award" appearing at page 647), 36, 37, 87a, 87b, 88, 89, 90, 91, 92, 100, 106a, and 107, but omit Plaintiffs' Exhibit 107a.	697- 842
21.	Testimony of J. F. Friedkin, including Plaintiffs' Exhibits 110, 110a, 111 and 112.	845- 905
22.	Testimony of W. F. Resch.	905-1026
23.	Testimony of N. B. Phillips, including Plaintiffs' Exhibits 115 through 148f.	1027-1193
24.	Testimony of Raymond A. Hill, including Plaintiffs' Exhibit 151.	1193-1226
25.	Testimony of Spencer L. Baird.	1246-1250
26.	Testimony of N. B. Phillips.	1251-1257
27.	Testimony of Robert L. Lowry.	1257-1287
28.	Testimony of Haskell R. Street, Defendant's Exhibits 19, 20 & 29.	1287-1307
29.	Testimony of Harlan Hugg.	1308-1340
30.	Testimony of Mayor Fred Hervey.	1372-1385
31.	Testimony of Nicolas Perez, Jr.	1385-1393
32.	Testimony of W. F. Resch.	1639-1642
33.	Testimony of Laurence Stevens.	1642-1647
34.	City's version of development of water and sewer systems, commencing near top of page 1647	
Val. No. 1579	with words "Mr. Edwards: Now, at this point. . ." and continuing through to testimony of Mr.	

Item		Page of Transcript of Record
Val. No. 1583	Raymond A. Hill on page 1651.	1647-1651
35.	Testimony of Raymond A. Hill.	1651-1681
36.	Testimony of Nicolas Perez, Jr.	1682-1690
37.	Testimony of W. F. Resch.	1691-1715
38.	Testimony of Harlan Hugg.	1716-1725
39.	Testimony of Haskell R. Street, including Defendant's Exhibit 77.	1725-1754
40.	Testimony of Robert L. Lowry, including Defendant's Exhibits 78, 79 and 80.	1754-1779
41.	Testimony of N. B. Phillips.	1779-1789
42.	Testimony of Everett J. Bradt.	1790-1793
43.	Testimony of W. F. Resch.	1797-1870
44.	Opinion of the Court.	1876-1974
45.	Original Judgment of the Court filed August 2, 1955.	1975-1989
46.	Defendant's Motion to Correct Judgment, filed Aug. 12, 1955.	1989-1991
47.	Motion by Plaintiffs to alter or amend Judgment, filed Aug. 12, 1955.	1991-1996
48.	Amended and Corrected Judgment dated and entered September 28, 1955.	1997-2009
49.	Notice of Appeal by Plaintiffs from Parts of Judgment.	2010-2014
50.	Notice of Cross-Appeal by Defendant from Parts of Judgment.	2015
51.	Cost Bond by Appellants other than the United States.	2016
52.	Cost Bond by City of El Paso.	2018

Item		Page of Transcript of Record
53.	Statement of Points on which Appellants Intend to Rely upon Appeal and Proof of Service.	2019-2027
54.	Statement of Points on which Defendant City of El Paso intends to Rely upon Cross-Appeal and Proof of Service.	2026-2030
55.	Order of Judge as to Certain Exhibits to be Transmitted as Originals to Appellate Court.	2030-2032
56.	Agreement as to Transcript of Record.	2032-2053
57.	Order Extending Time for Filing Record and Docketing Appeal (showing date of filing in Court of Appeals Dec. 19, 1955.	2053-2054
58.	Clerk's Certificate dated the 10th day of February, 1956.	2055
59.	This, Appellants' Request for Printing Record, and Acknowledgment of Service.	

Dated this the 17 day of February, 1956.

LOUIS A. SCOTT
and
1100 First National Building.
El Paso, Texas.

EUGENE T. EDWARDS,

11th Floor Bassett Tower,
El Paso, Texas.

Attorneys for all Appellants other than the United States of America,

By EUGENE T. EDWARDS,
RUSSELL B. WINE,
United States Attorney,

Federal Building,
San Antonio, Texas.

HOLVEY WILLIAMS,
(Holvey Williams),
Assistant United States Attorney,

United States Court House,
El Paso, Texas.

For the Appellant United States of America,

By HOLVEY WILLIAMS.

Service of a true copy of the above and foregoing request for printing of the record is acknowledged to have been made on the undersigned attorneys for the City of El Paso, Appellee in this appeal.

Dated this the 17 day of February, 1956.

ALLEN R. GRAMBLING,
Attorney for the City of El Paso.

APPELLEE'S DESIGNATION AS TO PRINTING RECORD.

Filed February 23, 1956.

No. 15954.

In the United States Court of Appeals for the Fifth Circuit.

El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs, W. L. Summers, and the United States of America, Appellants,

versus

City of El Paso, Appellee.

Appellee, City of El Paso, pursuant to the rules of this Court, requests that in addition to those portions of the Record designated to be printed by Appellants, the following additional testimony be printed:

I.

Appellee requests that all verbal testimony of all witnesses be printed.

II.

Appellee requests that the following exhibits in addition to those requested by Appellants be printed:

Item		Court Reporter Valenzuela's Page Nos.
1.	Plaintiffs' Exhibit #3—Convention between U. S. & Mexico 5/21/1906.	26
2.	Plaintiffs' Exhibit #34—Contract of June 22, 1950.	547
3.	Defendant's Exhibit #1—City Ordinance of Sept. 16, 1889.	886
4.	Defendant's Exhibit #2—City Ordinance of December 11, 1913.	889
5.	Defendant's Exhibit #30—Drawing indicating relative positions of various physical objects from American Dam to Santa Fe Street Bridge.	1243
6.	Defendant's Exhibit #32—Table of percentages of water, etc.	1247
7.	Defendant's Exhibit #33—Data on population.	1252
8.	Defendant's Exhibit #34—Letter from Secretary of Board of Water Engineers to Hugg dated 3 25 53.	1254
9.	Defendant's Exhibit #35—Order of Board of Water Engineers dated 5 5 52.	1256
10.	Defendant's Exhibit #49—Plat of El Paso by Anson Mills, 1859.	1327
11.	Defendant's Exhibit #50—City Ordinance of May 1, 1874.	1328
12.	Defendant's Exhibit #51—Act to incorporate City of El Paso, 1873.	1331
13.	Defendant's Exhibit #53—Ordinance of City of August 25, 1873.	1388
14.	Defendant's Exhibit #54—City Ordinance of Oct. 23, 1873	1390

Item		Court Reporter Valenzuela's Page Nos.
15.	Defendant's Exhibit #55—Resolution of November 14, 1874.	1396
16.	Defendant's Exhibit #56—City Ordinance of March 5, 1875.	1399
17.	Defendant's Exhibit #57—City Ordinance of August 28, 1875.	1402
18.	Defendant's Exhibit #58—City Ordinance of August 10, 1875.	1405
19.	Defendant's Exhibit #59—City Ordinance of Sept. 11, 1875.	1407
20.	Defendant's Exhibit #60—City Ordinance of Aug. 3, 1880.	1409
21.	Defendant's Exhibit #61—Ordinance of August 21, 1880.	1411
22.	Defendant's Exhibit #62—Petition of Charles R. Morehead and others, reference to franchise for El Paso Water Company, April 14, 1881.	1414
23.	Defendant's Exhibit #63—Ordinance of May 7, 1881.	1420
24.	Defendant's Exhibit #64—Act of March 2, 1889, Texas Legislature, granting a new charter to City of El Paso.	1422
25.	Defendant's Exhibit #65—Act of March 19, 1889, Irrigation.	1502
26.	Defendant's Exhibit #66—Resolution of City Council, Oct. 25, 1889.	1509
27.	Defendant's Exhibit #67—Ordinance of June 28, 1890.	1515
28.	Defendant's Exhibit #68—Ordinance of February 7, 1890.	1557

Item		Court Reporter Valenzuela's Page Nos.
29.	Defendant's Exhibit #69—Ordinance of May 16, 1890.	1559
30.	Defendant's Exhibit #75—Water Consumption Tax Receipt.	1564
31.	Defendant's Exhibit #77—Figures on water, etc.	1664
32.	Defendant's Exhibit #78—Figures on discharge of riverside canal, etc.	1693
33.	Defendant's Exhibit #79—Figures on EP Sewage Outfall 1939 to 1954.	1697
34.	Defendant's Exhibit #80—Annual figures on pattern of river operation.	1706

Appellee is not furnishing the page number of the Transcript in which these exhibits can be located, as Appellee does not have a copy of the transcript. In this connection, Appellee represents that the page number in the transcript of record can be determined by adding 66 in each instance to the page number of Reporter Valenzuela.

Dated this 22nd day of February, 1956.

HANS E. BROCKMOLLER,
El Paso National Bank Bldg.,
El Paso, Texas.

HAROLD L. SIMS,
3rd Floor El Paso Natural Gas Co. Bldg.,
El Paso, Texas.

ALLEN R. GRAMBLING,
By ALLEN R. GRAMBLING,
Attorneys for Appellee, City of El Paso.
3rd Floor El Paso Natural Gas Co. Bldg.,
El Paso, Texas.

Service of a true copy of the above and foregoing Request of Appellee for printing portions of the record omitted by Appellants is acknowledge to have been made on the undersigned attorney for Appellants in this appeal.

Dated this 22nd day of February, A. D. 1956.

EUGENE T. EDWARDS,
Attorney for Appellants.

JOINT STIPULATION OF COUNSEL AS TO PAYMENTS OF COSTS OF APPEAL ETC.

Filed May 29, 1956.

In the United States Court of Appeals for the Fifth Circuit.

El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs, W. L. Summers, and the United States of America, Appellants,

v. No. 15954.

City of El Paso, Appellee.

(And Reverse Title.)

It is stipulated by and between El Paso County Water Improvement District No. 1 on the one part, and City of El Paso on the other part, that regardless of the extent of relief granted to any of the parties to both appeals docketed under the above number as

the result of final judgment, the City of El Paso will pay one-half of the total Court costs on appeal, including the cost of printing the usual number of copies of the record, but excluding the costs of printing any briefs of either party, and El Paso County Water Improvement District No. 1 agrees that it will cause to be paid the other half of such Court costs. Extra copies if any, of the printed record in excess of the usual twenty-five in number which may be requested by any party shall be paid for by the party making the request to the Clerk of the Court of Appeals at the time the request is made.

Dated this 24th day of May, 1956.

LOUIS A. SCOTT,
(Louis A. Scott),
and
EUGENE T. EDWARDS,
(Eugene T. Edwards),
Attorney for El Paso County Water Improvement District No. 1.
ALLEN GRAMBLING,
(Allen Grambling),
and
HAROLD L. SIMS,
Attorneys for City of El Paso.

CAPTION.

Be It Remembered, that at a regular term of the United States District Court in and for the Western District of Texas, the Honorable Joe B. Dooley, presiding, and holding its sessions at El Paso Texas, which term began on the 4th day of October, A. D. 1954, and continued in session from term to term to, and including, the 28th day of September, 1955, there came on to be heard and determined, among other causes pending on the docket, the following cause, to wit:

El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers, together with The United States of America,

versus No. 1409 Civil Action.

City of El Paso.

A transcript of the proceedings follows:

AMENDED COMPLAINT.

(Filed January 22, 1953.)

In the United States District Court for the Western District of Texas, El Paso Division.

El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers, together with the United States of America, Plaintiffs,

vs. Civil Action No. 1409

City of El Paso, Defendant.

Plaintiffs named above complaining of defendant named above with leave of Court having been ob-

tained file this amended complaint by which they show to the Court:

I.

This Court has jurisdiction under the Act of June 25, 1948 (62 Stat. 930, U. S. Code Title 28, Sec. 1331), in that this is a civil action wherein the matter in controversy exceeds $3,000.00, exclusive of interest and costs, and arises under the Constitution, Laws or Treaties of the United States as hereinafter more fully shown in detail.

This Court further has jurisdiction under Act of June 25, 1948, Ch. 646 (62 Stat. 933, U. S. Code. Title 28, Sec. 1345) in that it is a civil action, suit or proceeding where the United States is plaintiff.

II.

Plaintiff El Paso County Water Improvement District No. 1 is a legal and valid conservation and reclamation district organized under the laws of Texas with principal office in El Paso County in said State, having as its constituents more than six thousand riparian land owners whose lands are situated in the valley of the Rio Grande on the Texas bank thereof in El Paso County of said state, including the individual plaintiffs L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs, and W. L. Summers, landowners within the Federal Rio Grande Reclamation Project, and residents of El Paso County, Texas, who bring this suit as representatives of all other persons similarly situated but too numerous to bring into Court, and are joined herein by the United States of America as plaintiff.

Defendant City of El Paso is a municipal corporation, organized and existing under the laws of the State of Texas, being within the Western District of Texas, El Paso Division, and process herein may be served upon it by serving Fred Hervey, its Mayor, a resident of said City of El Paso.

III.

Defendant, the City of El Paso, is geographically situated in the extreme western limit of the state of Texas on the north bank of the Rio Grande, the international stream separating the United States of America from the Republic of Mexico from a point northwest of and adjacent to the City of El Paso to the mouth of the Rio Grande on the Gulf of Mexico. North of the City of El Paso said river is an interstate stream, extending through the State of New Mexico to its source in the State of Colorado.

IV.

Situated in the arid portions of the states of New Mexico and Texas, where rainfall is not adequate to produce sufficient moisture for the advantageous growing of crops, is what is known as the Rio Grande Project, a federal reclamation project, operated and maintained by the plaintiff United States of America in pursuance of the provisions of the Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto. The gross area now served by the project comprises approximately 128,726 acres of land in the State of New Mexico and approximately 88,569 acres of land in the State of Texas, including

rights of way, such area in New Mexico being organized under the laws of that state into a municipal corporation named and called the Elephant Butte Irrigation District, and the area in Texas being organzed under the laws of the State of Texas into a municipal or public corporation under the name of El Paso County Water Improvement District No. 1, the corporate plaintiff herein. The lands served by the project form an area approximately 150 miles long and 5 miles wide, extending marginal to the river from near Caballo Reservoir in the State of New Mexico to the termination of the Tornillo Canal in the State of Texas below the City of El Paso and immediately above lands comprising the Hudspeth County Conservation and Reclamation District No. 1.

The project works consist of the Elephant Butte Dam and Reservoir, the Caballo Dam and Reservoir, numerous diversion dams in the Rio Grande and distribution and drainage works, all constructed by the United States of America at a cost of approximately $23,000,000.00, and now operated for the distribution of stored water and the use, drainage, collection, redistribution and re-use of so-called return flow or drainage waters for use on project lands, and also operated to meet the requirements of the Convention with Mexico of May 21, 1906 (34 Stat. 2953) known as the Root Treaty, by the terms of which the United States is required to deliver to Mexico a total of 60,000 acre feet of water annually in the bed of the Rio Grande at the point where the headworks of the Acequia Madre known as the Old Mexican Canal now exist above the City of Juarez, Mexico, except in case of extraordinary drouth or serious accident to the irrigation system in the United States, when the

amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to the lands under said irrigation system in the United States.

In constructing, operating and maintaining the Rio Grande Project, and in executing the contracts with the plaintiff district and the defendant City of El Paso, as hereinafter set forth, the Secretary of the Interior of the United States, as administrator of the Federal Reclamation Laws, acted in conformity with the provisions of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, and particularly the Act of February 25, 1920 (41 Stat. 451, 43 U.S.C.A. Sec. 521).

In pursuance of said Federal Reclamation Laws, and the laws of the Territory of New Mexico, later the laws of the State of New Mexico, the Secretary of the Interior through his duly authorized agent, on January 25, 1906, and by supplemental notice in April, 1908, withdrew all the unappropriated waters of the Rio Grande and its tributaries in New Mexico for direct diversion and for storage, and diversion and irrigation use on and in the Rio Grande Project, the diversion being accomplished by means of diversion dams in the Rio Grande in New Meico and Texas to project lands and continuously for a period of more than forty years, the waters of the river have been diverted at project diversion works therein, and distributed for use upon the project's lands and lands in Mexico, pursuant to the Convention or Treaty above mentioned, and said waters have been stored and withdrawn from storage reservoirs for later release or diversion at said diversion points, and distribution for use in irrigation on said project lands and to said

lands in Mexico by the United States with plaintiff district acting for the United States as its fiscal agent in such matters. For such purposes, the conduct of the operations has been in accordance with the laws of the states of Texas and New Mexico, and the bed of the Rio Grande has been utilized for the purpose of the carriage and diversion and distribution upon project lands of the waters of the Rio Grande, and the said River Bed has been used for the recapture and drainage of so-called return flow from the irrigation of a part of the said project lands for use upon lands of lower elevation in said project, both in New Mexico and in Texas.

Prior to the initiation of the Rio Grande Project and amendment of the Texas laws relative to the appropriation of flood and storm waters of the streams of the state and the creation of the State Board of Water Engineers, there was appropriated under the then existing laws of the State of Texas passed by the Legislature and approved March 19, 1889, certain of the unappropriated waters of the Rio Grande for diversion and carriage through a community ditch known as the El Paso Irrigation Canal but now known as the Franklin Canal, title to which is now in the United States of America, and which is a part of the irrigation works employed for the use and benefit of the Rio Grande Project.

The appropriations so made and the rights thereunder were, on the construction of the Rio Grande Project, duly assigned to the United States of America as a part of said project rights, and in pursuance of Chapter 171 of the General Laws of Texas, 33rd Regular session of the Legislature, a certified copy of the original notice of such appropriation as it was filed of record July 8, 1889, in the office of the County

Clerk of El Paso County, Texas, was duly filed in the office of the State Board of Water Engineers. The appropriation so made and so recorded with the County Clerk of the County of El Paso, Texas, a certified copy being filed with the State Board of Water Engineers is a valid and existing appropriation of the waters of the Rio Grande in the State of Texas for irrigation use and benefit of and appurtenant to lands of the Rio Grande Project.

V.

Further limiting appropriable waters of the Rio Grande in Texas is the Rio Grande Compact among the States of Colorado, New Mexico and Texas, signed at Santa Fe, New Mexico, March 18, 1938, ratified and confirmed by the State of Texas, Acts of 1939, 46th Legislature Special Laws page 531, effective March 1, 1939, Vernon's Civil Statutes of Texas, Annotated, Art. 7466e-1 (Ratified by the State of New Mexico, Laws of 1939, Chap. 33, page 59, ratified by the State of Colorado, Laws of 1939, Chap. 146, and approved by the Congress of the United States, Public Law No. 96, May 31, 1939, Chap. 155, 53 Stat. 785).

VI.

The Rio Grande is a stream in which flood and storm waters are available only during short intervals over long and irregularly intermittent periods of time.

Prior to the time when defendant City of El Paso as a municipality first began to withdraw water from the Rio Grande, the entire flow of the river and all of the waters thereof, including flood or storm waters within El Paso County after entering the State of

Texas from the State of New Mexico had been fully appropriated by application to beneficial use for irrigation of lands in the El Paso Valley above and below the City of El Paso, or to lands in Mexico pursuant to the Treaty of 1906.

VII.

On September 16, 1889, the City of El Paso, defendant herein, granted to El Paso Irrigation Company a franchise for right-of-way fifty feet wide beginning at a point of rock 650 feet to Rio Grande from the A. T. & S. F. Railroad well, thence southeast across all streets and alleys crossed by said line to the intersection of 8th and Durango Streets, and thence, by a course described therein, to the southeasterly city limits. Sec. 2 of said franchise especially providing that it should last for a period of fifty years from July 6, 1889, and said franchise is duly recorded in Minute Book F, Page 41 of the Ordinances of the City of El Paso, now in possession of said defendant which is notified to produce on the trial of this cause the original or a duly authenticated copy of the original of said franchise, or secondary evidence of its contents will be produced.

Thereafter, the rights of the El Paso Irrigation Company were duly assigned, transferred and conveyed to the United States of America, and on December 11, 1913, by ordinance of that date, the defendant City herein amended the ordinance and franchise of September 16, 1889, by granting to the United States of America, as assignee and successor of the El Paso Irrigation Company, the right-of-way fifty feet wide from its starting point as set out in the

franchise to the Irrigation Company above mentioned, which ordinance was in writing and as a part thereof contained the following: "provided that the United States of America, their successors and assigns, shall concrete line said canal on Eighth Street and shall erect iron railings on each side of said canal, the whole length of Eighth Street . . . and shall construct, erect, and maintain bridges at the points and of the dimensions and on the streets hereinafter set forth: "(Here were designed certain streets)" and shall erect and maintain and replace all bridges east of Cotton Avenue with steel or concrete bridges 20 feet wide, and bridges on such other streets as the Council may require. . . ." Said ordinance was duly placed of record in Minute Book C, under date of December 11, 1913, Proceedings of the City Council, and the record thereof is now in the possession of the defendant City of El Paso which is notified to produce the original or an authenticated copy of said ordinance, or secondary evidence of its contents will be used on the trial of this cause.

VIII.

The original franchise from the City of El Paso to El Paso Irrigation Company, of date September 16, 1889, by its terms expired on July 5, 1939, and thereafter, on September 5, 1939, the defendant, City of El Paso, duly passed an ordinance amended, November 9, 1939, conveying to the United States of America all of the right, title and interest of the City of El Paso in and to the right-of-way occupied by the Franklin Canal, and the appurtenances thereto, through the City of El Paso, and in the location thereof as it existed at that time. Said ordinance contained the

following: "provided, however, there is reserved to the City of El Paso the right to use, as a part of the city street system of said city, all bridges heretofore constructed by the Bureau of Reclamation of the United States" at mentioned points, and further "provided, however, and this ordinance and the conveyance to be made hereunder are subjct to the condition that the United States shall be obligated to maintain the said bridges at the said described crossings, contingent, however, upon appropriations being made therefor by Congress; and there is further reserved to the City of El Paso the right to construct and maintain, at its own cost and expense, such additional bridges and other structures across said canal, other than those hereinabove designated, as it may deem necessary." This amended ordinance was duly recorded in Minute Book Z-2, Page 448, of the proceedings of the City Council of the City of El Paso, and said minute book and the record of said ordinance is now in possession of said defendant which is notified to produce the original or a duly authenticated copy thereof, together with the original or a duly authenticated copy of the ordinance of September 5, 1939 on the trial of this case, or secondary evidence of the contents will be used as to both.

IX.

Thereafter, by deed dated November 9, 1939, the City of El Paso, "in consideration of the benefits derived and to be derived by said city, and all of the residents thereof, by the operation and maintenance by the United States of America, and its successors and assigns, of the Franklin Canal of the Rio Grande

Reclamation Project, and pursuant to the provisions of that certain act of the 45th Texas Legislature, Chap. 77 (1937)", an ordinance of the City of El Paso duly enacted and approved on the 9th day of November, 1939 ". . . does by these presents Bargain, Sell release and Forever Quitclaim and confirm" to the United States of America, pursuant to Act of June 17, 1902, (32 Stat. 388) and acts amendatory thereof, the property described in the ordinance of November 9, 1939, to which reference is above made, with right of reverter if the United States in the future decides not to use the canal for irrigation purposes, "and the obligation of the United States under the conditions of this conveyance to maintain any bridge or bridges situated on such part thereof so reverting to the City of El Paso, shall thereupon terminate, but any such reverter shall leave unaffected whatever right, title or interest the United States may have or acquire in or to said hereinabove described premises other than by virtue of this conveyance." This quitclaim deed was duly placed of record in Book 660, Page 399, of the Deed Records of El Paso County, Texas.

X.

Thereafter, on November 9 1939, a resolution was adopted by the Board of Directors of the plaintiff, El Paso County Water Improvement District No. 1, the fiscal agent of the United States of America, by which it obligated itself to the City of El Paso to furnish funds for the maintenance of bridges at points specifically enumerated in said city ordinance of September 5, 1939, and in the deed of November 9, 1939, made in pursuance thereof, whenever such funds are not appropriated by Congress or furnished by the Federal Government or its agencies.

XI.

On January 17, 1920, by written contract bearing that date, under and pursuant to the authority of the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplemental thereto, a contract was entered into between the United States of America, acting for such purpose by John Barton Payne, Secretary of the Interior, the El Paso County Water Improvement District No. 1, and the El Paso Valley Water Users' Association, the latter being a private corporation and the predecessor of the plaintiff, organized under the laws of the State of Arizona but having its principal place of business in the City of El Paso, Texas, by the terms of which it was, among other things, provided that the El Paso County Water Improvement District No. 1, plaintiff herein, should assume the liability for reimbursement to the United States of the aggregate sum represented by the cost of the irrigation and drainage works theretofore constructed or thereafter to be constructed for the use and benefit of lands within the plaintiff District, and agreed to pay the same and each installment thereof such aggregate sum to include the District's proportionate share of the cost for the construction of the Elephant Butte Reservoir and the total liability assumed by the District for irrigation and drainage construction purposes, exclusive of penalties to be in no case more than $4,941,000.00. By said contract it was further agreed that as soon as the affairs of El Paso Valley Water Users' Association should permit, there should be a dissolution of said Association. By a proceeding in rem in the District Court of El Paso County, Texas, 65th Judicial

District, number 19944 on the docket of that Court, styled Ex Parte El Paso County Water Improvement District No. 1, it was adjudged on April 4, 1921, that plaintiff District was an is a legal and valid conservation and reclamation district under the Constitution and laws of Texas, and the above mentioned contract entered into with the United States of America January 17, 1920, was and is a valid contract, binding on plaintiff District. Said judgment is a matter of record in Book 4, Page 365, of the Minutes of the 65th District Court of El Paso County, Texas.

XII:

Thereafter, on the 12th day of October, 1922, a contract supplementary to the contract of January 17, 1920, was entered into between the United States of America, acting through E. C. Finney, First Assistant Secretary of the Interior, and El Paso County Water Improvement District No. 1, pursuant to and under authority of the same Act of Congress above mentioned as authority for the execution of the contract of January 17, 1920, by the terms of which it was provided, among other things, that the United States of America would expend, in addition to the amounts covered by the contract of January 17, 1920, the sum of $1,165,000.00, or so much thereof as may be appropriate and necessary in the opinion of the Secretary for additions to existing storage works, and it was provided therein that the plaintiff District should pay to the United States as a part of the construction cost of the project the aggregate cost of all works constructed under the provisions of said supplementary contract just mentioned, provided that such aggregate cost, exclusive of certain named items, should in no event exceed the sum of $1,165,000.00.

XIII.

Under date of November 10, 1937, plaintiff, El Paso County Water Improvement District No. 1, entered into a written contract with the United States of America, acting for that purpose through Harold Ickes, Secretary of the Interior, by the terms of which contract, among other things, it was provided that El Paso County Water Improvement District No. 1, for itself and its water users and landowners, and for its successors and their successors and assigns, conveyed and granted to the United States all of its and their claims of right, title, interest and estate in the use of the Elephant Butte Dam and other project works, including the project water supply, for the development of hydro-electric energy by the United States, and in consideration of such grant and transfer, the United States of America relieved said District of 43.2258 per centum of the amount in said contract specified as the equitable amount of the construction cost chargeable to power development, being the sum of $1,835,544.00, and agreed to reduce and did reduce the obligations of the District for the repayment of its share of the construction cost of the Rio Grande Federal Reclamation Project (United States and Mexico) from $6,106,000.00 which the District had assumed and had agreed to pay to the United States under its original contract as amended and supplemented, to $4,270,456.00. Said contract further provided that the El Paso County Water Improvement District No. 1 should receive credit for water rental collections from Hudspeth County Conservation and Reclamation District, and said contract further provided that the amounts due the United States should be a first charge upon

the collections of El Paso County Water Improvement District No. 1, plaintiff herein, which agreed that it would cause to be levied and collected all necessary assessments, including a sum to cover (1) any individual collection delinquency for past years, and (2) estimated individual collection delinquency for the year for which assessments are being levied, and should use all powers and resources of the District, including the taxing power of the District, and the power to withhold delivery of water, to collect and pay to the United States all charges provided for in said contract, in full, on or before the day that same should become due. Thereafter, on November 8, 1939, in proceeding in rem, numbered 46742 on the docket of the District Court of El Paso County, Texas, 41st Judicial District, styled Ex Parte: El Paso County Water Improvement District No. 1, it was adjudged that said El Paso County Water Improvement District No. 1 is a legal and valid conservation and reclamation district under the Constitution and the laws of the State of Texas relating thereto, and said contract entered into by and between the United States of America, acting for said purpose by Harold Ickes, Secretary of the Interior, under the provisions of the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplemental thereto, and the El Paso County Water Improvement District No. 1, a public corporation, which contract is dated the 10th day of November, A. D. 1937, was and is in all respects a valid contract, binding upon said El Paso County Water Improvement District No. 1

XIV.

Plaintiff District has, at all times since, been operating under and pursuant to the above described contracts with the United States of America. Defendant, City of El Paso, is not now and never has been a part of or constitutent of El Paso County Water Improvement District No. 1. Defendant, City of El Paso, has no rights in the Rio Grande Project Waters, including previously appropriated waters of the Rio Grande as above set out, except insofar as the City of El Paso has acquired any rights by virtue of the contracts hereinafter recited.

XV.

On February 18, 1941, a written contract was entered into between the United States of America, the defendant City of El Paso, and the plaintiff El Paso County Water Improvement District No. 1, pursuant to the Reclamation Laws above recited. That contract provided, in Section 8 thereof, that the defendant City of El Paso will provide suitable facilities for the diversion of water from the river, and in Section 9 thereof, it was provided that subject to the Reclamation Laws, and in compliance with said contract, there should be delivered in each year, to the City's diversion facilities a quantity of water not to exceed the lessor of:

(i) Quantity that can be used beneficially for municipal purposes.

(ii) Total quantity that acquired lands would have been entitled to if held by private owners.

(iii) 3½ acre feet for lands acquired by the city pursuant to the contract.

Paragraph 10-h of said contract provides that the city of El Paso may acquire not to exceed 2,000 acres of District water right lands being lands within the Rio Grand Project.

Paragraphs 11 and 12 of the contract provide the terms of payment to the United States for the credit of the El Paso County Water Improvement District No. 1. An executed original of this contract is in possession of defendant City of El Paso, which is notified to produce the same on the trial of this cause, or other evidence will be used.

XVI.

On December 1, 1944, another contract was entered into by and between the United States of America, the defendant City of El Paso, and also the plaintiff El Paso County Water Improvement District No. 1, together with the Elephant Butte Irrigation District, the municipality organized under the laws of the State of New Mexico, which contract was substantially the same as the previous contract of February 18, 1941, except in the contract of December 1, 1944, it was provided, with reference to project lands with water rights, that "The city shall not acquire or retain title to water right lands so as to hold at any time an aggregate amount thereof in excess of 2,000 acres within the Elephant Butte District, and an aggregate amount thereof in excess of 2000 acres within the El Paso District" (Art. 9-b), and provided in Art. 10-a

that the city should "upon receipt of notice rendered by either or both the Elephant Butte District and the El Paso District to pay direct to each of said respective districts all annual assessments, tolls, levies and charges for operation and maintenance, construction, general fund, excess water, reservoir services and all other tolls and charges levied or assessed by either or both of said respective districts on lands within such respective districts purchased by the city in accordance with this contract." An executed original of said contract of date December 1, 1944, is in possession of defendant City of El Paso, which is notified to produce the same on the trial of this cause or other proof will be made. However, the City of El Paso did not acquire any project lands within the State of New Mexico with the exception of a tract of approximately 166 acres.

XVII.

On May 8, 1950, by an order bearing that date, the Board of Water Engineers of the State of Texas undertook to give to the City of El Paso a permit to take 27,000 acre feet per year of the unappropriated or unused storm, flood and return waters of the Rio Grande.

XVIII.

On August 10, 1949, there was entered into a contract between the defendant City of El Paso and the plaintiff, El Paso County Water Improvement District No. 1, with the approval of the Secretary of the Interior of the United States, permitting the use of

Project works by the defendant City of El Paso for the purposes of that contract as set forth therein, and which provided that such use by said defendant should be at such times as there may be storm, flood, return flow and unavoidable waste waters in excess of the requirements of the District and the Hudspeth County Conservation and Reclamation District No. 1, as determined by the Project Manager, and that under those circumstances, the City may divert such waters for municipal use, and that for the use of Project works in the transportation of such excess waters of the Rio Grande, the City should pay to the District the amounts indicated in the contract. It was further provided, in Section 10 of that contract, that after sewage effluent is discharged into the Rio Grande, it shall become a part of the Project water supply, and it was set forth in Paragraph 11 thereof that such contract should be subject to all contracts then or thereafter in force between the District and the United States of America, and between the Hudspeth County Conservation and Reclamation District No. 1 and the United States of America, and to all Reclamation Laws, and by Paragraph 12, it was recited that if the City pursued its application before the Water Board, any award granted thereunder would be subject to the agreement of August 10, 1949. The approval by the Secretary of the Interior was subject to acceptance of his interpretations as set out in his letter of September 23, 1949, to the Mayor of the City of El Paso, and to the District, which interpretations were accepted by the City on September 28, 1949, and by the District on September 30, 1949, executed originals of all of which are in possession of defendant City of El Paso, which is notified to produce the same

on the trial of this cause or other evidence will be introduced.

XIX.

Under the contract of August 10, 1949, and since that date, the Project Manager has taken into consideration the amount of effluent discharged by the City of El Paso as sewage into the Rio Grande in his determination of whether there are surplus waters in the river in excess of the needs of Project lands below such point of discharge and lands within Hudspeth County Conservation and Reclamation District No. 1 and by this procedure the City of El Paso now benefits under the contract of August 10, 1949, to the extent that it discharges sewage into the river.

Notwithstanding the contract of August 10, 1949, and the benefits received by the City thereunder with reference to such effluent, it has taken and declared its intention to continue to take from the Rio Grande or from the Franklin Canal an amount of water equivalent to the quantity of sewage effluent discharged by it into the river without making any payment for such water or the use of Project facilities, all in violation of said contract.

XX.

On December 1, 1949, a stipulation in writing was entered into between defendant City of El Paso and plaintiff El Paso County Water Improvement District No. 1, together with the United States of America and Department of the Interior, Hudspeth County Conservation and Reclamation District No. 1, Ft. Quit-

man Land Company, Sam H. Cook K. D. Sheppard, Kenzie H. Turner, Earl Beasley, W. E. Upchurch, S. S. Upchurch, Ronald Miller, A. B. Cathey, T. D. Lovelady, Paul O. Davidson, Roy H. Davidson, R. C. Ivey, R. T. Hoover, Jr. Joseph R. Hoover and Lou ann Hoover Feuille. Said stipulation sets out a copy of the contract of August 10, 1949, to which reference is above made, and alleges it became binding on September 23, 1949, and was still in effect, and that protest to the State Board of Water Engineers, made by the parties other than the City of El Paso, should be withdrawn on condition that the rights of the City of El Paso be subject to the terms of the contract of August 10, 1949, to which reference has been made above. An executed original of the stipulation of December 1, 1949, is in possession of defendant City of El Paso which is notified to produce the same on the trial of this cause or other proof thereof will be made.

XXI.

On June 22, 1950, a contract in writing was entered into between the defendant, City of El Paso, and the plaintiff, El Paso County Water Improvement District No. 1, which provided that the above mentioned permit which the Board of Water Engineers of the State of Texas undertook to grant to the City of El Paso on May 8, 1950, should be subject to the contract of August 10, 1949, to which reference is above made, as clarified and interpreted by the Secretary of the Interior in his letters of September 23, 1949 that said contract was still in effect and the agreement of June 22, 1950, should inure to the benefit of al signers of the contract of August 10, 1949, or of the stipulation of December 1, 1949, which was filed with

the Texas State Board of Water Engineers. An executed original of said contract of June 22, 1950, is in possession of defendant City of El Paso which is notified to produce the same on the trial of this cause, or proof thereof will otherwise be made.

XXII.

At the time the deed from the City of El Paso to the United States of America, dated November 9, 1939, recorded in Book 660, Page 399, of the Deed Records of El Paso County, as above mentioned was executed, J. E. Anderson, who signed the same in behalf of the City, was the duly elected and qualified Mayor thereof, and was authorized to sign and deliver said deed, and it was and is the valid deed of the defendant City of El Paso; and at the time of the execution and delivery of the several contracts herein set forth, and mentioned above, all of the individuals who signed, executed and delivered the sar either did so in their own behalf or were duly auth ed so to do by the respective parties to each of said agreements, for whom such indiv. luals purported to act, so that in each instance the contract became the act and agreement of all the parties named therein either acting in person or acting by and through their duly authorized agents.

XIII.

Since September 16, 1889, the date of the original franchise granted to the El Paso Irrigation Company, the city limits have been extended eastward on several occasions, so that at the present time the easterly

limits of the city of El Paso are many miles from the point at which said city limits terminated in the year 1889. The said El Paso Irrigation Canal and system as now constructed, consists of approximately thirty miles of main canal, main headgates or intakes, desaguas, checks, headgates for deliveries to laterals, drops, etc., and all of the works have been completed. Said canal and system is now owned by the United States of America, and has been, by the United States of America altered, enlarged and repaired as the occasion required, and is now known as the Franklin Canal and system of the Rio Grande Project. The amount of water that has been diverted, taken and used in each year through the Franklin Canal since the acquisition and ownership of said canal by the United States of America has been approximately 70,000 acre feet or more per annum, which is the present approximate capacity of the canal, and all of which is necessary for the distribution of water to consumers below El Paso served by the Franklin Canal and entitled to such waters under the Rio Grande Project, and said canal and system as now constructed is now and has been for more than thirty years used by the United States of America in the distribution of water of the Rio Grande Project.

XXIV.

Following the signing of the above mentioned deed and all of the contracts, agreements and stipulations hereinabove set out, and shown to have been executed by the City of El Paso, said defendant recognized each and all of them as valid and binding on it, and accepted the benefits conferred on it by each and all

of them and recognized the duties, obligations and undertakings imposed on it by the terms thereof and made, fulfilled and performed each and all of them, and made all payments to and for the benefit of plaintiff District and the United States of America as required therein until after the present Mayor of El Paso, Fred Hervey, had been duly elected and qualified as such on the 12th day of April, 1951. Since that date, for the first time the defendant has taken the position that said contracts are void invalid and of no force and effect, and are unauthorized by the above quoted Reclamation Laws of the United States of America and are not binding upon the defendant City of El Paso, but plaintiffs say that by reason of the above related facts and course of conduct it is estopped from maintaining such position.

XXV.

Plaintiffs allege that the deed and each and all of said contracts, stipulations and agreements is and are valid obligations, binding on the City of El Paso, and that under the existing contractual relation between the plaintiff District, plaintiff United States of America, and defendant, resulting from the agreements in writing between the parties as hereinabove set forth, said defendant became indebted to the plaintiff District as fiscal agent for the United States of America or otherwise, and to the United States of America for project water and facilities used by the City of El Paso for the water year ending September 30, 1951, in the sum of $14,421.35, which it had contracted to pay on or before December 1, 1951, and for which it was duly presented with a bill in October 1951.

Defendant City became delinquent in said sum on January 31, 1952, but on February 4, 1952, paid to plaintiff District the sum of $12,049.65, leaving past due and unpaid $2,371.70, with penalties and interest of 6% per annum from February 1, 1952 to the damage of plaintiff District in that amount.

Plaintiffs allege that the withholding of said sum of $2,371.70 was not due to mistake or inadvertence, but was deliberate and intentional on the part of the defendant City in order to compel litigation for its collection and for determination of the rights of the parties to the water of the Rio Grande. In this connection plaintiffs allege that under the existing contracts, the obligations of the defendant City of El Paso for the water year ending September 30, 1952, and for each year thereafter, will amount to more than $10,000.00, and the value of water withdrawn by the City of El Paso from the Rio Grande during the years 1951 and 1952 exceeds $3,000.00 in value, and that the amunt in controversy between the plaintiff District and the defendant City for the water year 1951 ending September 30, 1951, and for each water year thereafter ending on September 30 is in excess of $3,000.00.

In addition Plaintiffs show to the Court that the City of El Paso, notwithstanding the language of the deed of November 9, 1939, is wrongfully demanding of plaintiff District and of plaintiff United States of America, as set out in sub-paragraph (a) of paragraph XXVI below, that it or they replace all existing bridges with new structures to be erected pursuant to plans and specifications prepared by the City.

The cost of construction of any one of the new bridges which defendant City of El Paso demands be constructed by plaintiff is more than $3,000.00.

XXVI.

A dispute of law has arisen between plaintiffs on the one part and defendant City of El Paso through its Mayor and City Council on the other part as to the respective rights, privileges, duties and obligations of the parties resulting from the several ordinances, deed and the several written contracts and stipulations above set forth, and their respective rights to the water of the Rio Grande, including the following:

(a) The City of El Paso insists and contends, by reason of the passage of the original ordinance of September 16, 1889, granting to the El Paso Irrigation Company the franchise for the right-of-way for the Franklin Canal, as modified by the ordinance of December 11, 1913 and by reason of the ordinance of September 5, 1939, as amended on November 9, 1939, supported by the quitclaim deed from the City of El Paso to the United States bearing the latter date, and by reason of the resolution adopted by the Board of Directors of El Paso County Water Improvement District No. 1, on November 9, 1939, above recited, the plaintiffs herein, El Paso County Water Improvement District No. 1, or the United States of America, or both, is or are under legal obligation, at its or their own cost and expense, to replace all existing bridges forming City streets across the Franklin Canal, and to install new and additional bridges of the width, kind and character desired by the City at points designated by the City Council, not only on the street crossings designated in the ordinance of December 11, 1913, nad the ordinance of November 9, 1939, but at such other street crossings as the City Council may point out.

On the other hand, plaintiffs insist and contend that the ordinance of December 11, 1913, was merely an amendment to the ordinance of September 16, 1889, granting to the El Paso Irrigation Company the original franchise which fully and completely expired July 5, 1939; that the only present and future obligation of the plaintiff District or the United States relative to bridges over said canal is the maintenance of bridges at points specifically enumerated in the ordinance of September 5, 1939, for such purpose of maintenance and that the term "maintenance" does not include the erection of new structures, and is limited to the obligation to repair, keep up and preserve bridges in existence at the time of the passage of said ordinance of September 5, 1939.

(b) The defendant City insists and contends that all of the contracts or stipulations set forth as having been signed by the parties hereto are void and of no effect, and that the defendant City of El Paso is not bound by any of them, and that they are not authorized by or within the terms of the Reclamation Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplementary thereto, particularly the Act of February 25, 1920 (41 Stat. 451), and that it has the legal right to take from the Franklin Canal and from the Rio Grande itself waters of the Rio Grande Project, unlimited by restrictions imposed on it by the terms of any of said contracts or stipulations, and without paying to plaintiff District or to plaintiff United States of America the charges set forth in said contractual agreements, or being otherwise liable to plaintiff District or to the United States of America for the value of said water or the use of Project facilities in its transportation.

To the contrary, plaintiff District and the United States of America insist and contend that whatever rights the City has to take Project water from the bed of the Rio Grande or from the Franklin Canal or other Project works, are limited by and subject to the terms of those written contracts and agreements executed in good faith by all parties including the defendant City of El Paso on February 18, 1941, December 1, 1944, August 10, 1949, December 1, 1949, and June 22, 1950, all of which are authorized by and are within the terms and effect of the Reclamation Laws of the United States of America as set forth by the above mentioned Acts of Congress; and that without such contractual right the defendant City of El Paso has no authority for diverting water from the Rio Grande, an international, interstate stream, the waters of which have been fully appropriated by plaintiffs, and the waters of which are further controlled and limited by the Rio Grande Compact between the states of Colorado, New Mexico and Texas, together with the Convention of 1906 with the Republic of Mexico, being a Treaty of the United States of America with that country; and that said City of El Paso may not lawfully use Project facilities owned by the United States of America without a proper license first having been obtained.

XXVII.

In furtherance of its attitude, the defendant City of El Paso has demanded of plaintiff District that it forthwith proceed with the replacement of all existing bridges across the canal, with new structures, and that additional bridges be built also at the expense of plaintiff District or at the expense of the United

States Government, or at the expense of both, and has further advised the plaintiff District that in the event of its failure to accede to these demands the defendant City would consider the right to continue the use if the Franklin Canal through the City of El Paso to be forfeited and would take the necessary steps to effect such forfeiture.

XXVIII.

Also the defendant City has notified the plaintiff District and plaintiff United States of America that it intends forthwith to pump and is pumping into the Rio Grande bed, at a point about 16½ miles upstream from the headgate of the Franklin Canal and above the point of delivery of water by the United States of America to Mexico under the treaty of May 21, 1906, such water as is obtainable from wells on irrigable land owned by defendant City within the Rio Grande Project (which the City is leasing to individuals to be farmed by them, presumably with irrigation water procured through the exercise of water rights attached to the same land on which the wells are located), and that the defendant City is withdrawing and will, at its water treatment plant within the City limits of El Paso continue to withdraw from the Rio Grande or from the Franklin Canal, an amount of water not limited by the provisions of any of the above mentioned contracts which the plaintiffs insist are valid and are the measure of the defendant City's rights.

XXIX.

Plaintiffs further show to the Court that on account of the unusually and abnormally low runoff of the

water shed of the Rio Grande for several years past the amount of water in storage in, Elephant Butte Reservoir and Caballo Reservoir in the State of New Mexico is abnormally low and but for the storage of such water behind said dams, the Rio Grande at El Paso would have been completely dry preceding the filing of this complaint. The water supply of defendant City is not restricted to waters of the Rio Grande, but comes in the main from wells which are situated on city owned property not within the Rio Grande Project, and the plaintiffs are informed and believe, and allege that the water supply of the City of El Paso at the present time from its wells just mentioned, plus the water available to it under and pursuant to the contracts above set out, is adequate, but the city is pumping and intends to pump water from the Rio Grande or from the Franklin Canal, unless restrained by this Court, into its well on property not abutting upon the river and not riparian, and having no riparian rights.

XXX.

Unless restrained by order of this Court, the defendant City of El Paso will continue to carry out its expressed intentions and conduct as above set forth, which the plaintiffs allege to be unlawful, and should defendant City, by any means, obstruct the transportation of water through the City of El Paso in the Franklin Canal in retaliation for the refusal of plaintiff District and the United States of America to accede to defendant's demand that it build new bridges across the canal such action would be an unwarranted interference with the use of said canal system for the distribution of Rio Grande Project waters, and

plaintiff District and its landowners being its constituents will suffer irreparable injury for which they have no adequate remedy except by this action, in that a flow of water through the canal at the rate of 70,000 acre feet or more per year, would be interrupted and plaintiffs with land below El Paso would be deprived of the use thereof and their lands and crops would suffer serious damages caused by land of water, and plaintiff District and its constituents have no other means than the Franklin Canal by which to transport said 70,000 acre feet or more per annum to points of distribution now being served by said canal.

It is further shown to the Court that should defendant City continue to take water from the bed of the Rio Grande or from the Franklin Canal without regard to the restrictions or limitations or conditions imposed on it by the terms of the solemn obligations in writing signed by it as above set forth, plaintiff District and its constitutents will suffer serious and irreparable injury for which they have no adequate remedy except by this action, in that the amount of water available for the 1952 irrigation season was insufficient to meet the normal requirements for irrigation purposes of those entitled to receive distribution within the Rio Grande Project, and in that the amount of water available for the 1953 season will be inadequate for normal purposes and whatever water is now released, or within the foreseeable future will be released into the Rio Grande above El Paso from the Elephant Butte Reservoir or from the Caballo Reservoir, is all stored water lawfully accumulated, and in which the defendant City has no right in the absence of contract, and the action of said defendant would deplete an already woefully inadequate supply and

work a hardship and damage incalculable at this time.

XXXI.

Defendant City of El Paso through its mayor has publicly questioned the ownership of the Franklin Canal by the United States of America and has publicly stated that the, City had taken water which it had been told it had no right to take and that it was refusing to pay charges for the use of the Franklin Canal. City of El Paso now owes to plaintiff District as fiscal agent of the United States of America, or to the United States of America, approximately $15,000.00 made up of charges to the City by reason of its ownership or water-right land within the Rio Grande Project for the water year ending September 30, 1952, combined with charges for the City's use of project facilities for transportation of water to its treatment plant under the contract of August 10, 1949, which last amount approximates $2,500.00. Defendant City has repudiated the contract of August 10, 1949, and all ratifications thereof, and has stated that it will not pay any amount claimed by plaintiff District or the United States of America to be due thereunder.

XXXII.

Plaintiff United States of America, in connection with its operation of the Rio Grande Project, constructed the Canutillo Lateral Wasteway in 1924-1925; the Vinton River Lateral in 1936-1937; and the Vinton River Drain in 1939-1940 near Canutillo, Texas. They also purchased the Franklin Canal in 1912 from the Franklin Irrigation Company, and reconstructed it at

project expense in 1913-1914 and again in 1921. These facilities have been operated continuously since the date of construction or acquisition for the benefit of the Rio Grande Project and are now being so operated and maintained. The Defendant City of El Paso has drilled at least six water wells in its Canutillo Reservoir Site. It discharges the flow of these wells into the Canutillo Lateral Wasteway, the Vinton River Lateral, and the Vinton River Drain, from when they flow into the Rio Grande, and on reaching the vicinity of the City of El Paso these flows are again diverted from the river into the Franklin Canal and into the City's water treatment plant for use in its municipal water supply. The use by Defendant City of El Paso of the features above listed in the manner set forth has been without authority, and all efforts of the plaintiff United States to legalize this use with a proper license have been ignored.

Wherefore, plaintiffs pray that defendant be cited to appear and answer herein; that the Court by its judgment and decree herein find and determine:

(a) That the obligation of the plaintiff District with reference to bridges across the Franklin Canal is limited to the furnishing of funds for the maintenance of bridges in existence across the Franklin Canal on September 5, 1939, at South Santa Fe Street, South El Paso Street, South Oregon Street, South Mesa Avenue, South Stanton Street, South Kansas Street, South Campbell Street, South Florence Street, South Ochoa Street, South Virginia Street, South St. Vrain Street, Hill Street, Tays Street, Park Street, Fourth Street, First Street, Laurel Street, Eucalyptus Street, Willow Street foot bridge, South Piedras Street, South Raynor Street, South Estrella Street, South Grama Street,

South Stevens Street, Hammett Boulevard, Boone Avenue, Evergreen Street, (in Washington Park), Washington Park East Road, Tobin Place, Alley east of Hadlock Place, Francis Street and Verde Avenue in the City of El Paso, Texas, as enumerated in the ordinance dated September 5, 1939, amended November 9, 1939, conveying, transferring, quit-claiming, relinquishing and confirming unto the United States of America all of the right, title and interest of the City of El Paso in and to the right-of-way occupied by the Franklin Canal and appurtenances thereto through the City of El Paso, and in the then location thereof, and as further set forth in the quitclaim deed from the City of El Paso to the United States of America dated November 9, 1939, whenever such funds are not appropriated by Congress or furnished by the Federal Government or its agents, and that such obligation to furnish funds to maintain excludes the obligation to furnish funds for the erection of new structures, and is limited to the obligation of furnishing funds for the repairing, keeping up and preserving only those specifically designated bridges.

(b) That the obligation of the United States of America with reference to bridges across the Franklin Canal is limited to the maintenance of such bridges in existence across said canal where same is intersected by the streets designated in the deed from the City of El Paso to the United States of America dated November 9, 1939, recorded in Book 660, page 399, of the Deed Records of El Paso County, Texas, contingent, however, upon appropriations being made therefor by Congress, and that such obligation to maintain excludes the obligation to furnish funds for the erection of new structures and is limited to the

obligation of repairing, keeping up and preserving only those bridges at such specifically designated intersections.

(c) That each and all of the contracts and stipulations herein set forth and shown to have been signed by the defendant City of El Paso, are valid, existing obligations and are authorized by and are within the terms, effect and scope of the Reclamation Laws of the United States as set forth in the Acts of Congress herein recited.

(d) That the right of the City of El Paso to take water from the Rio Grande or from the Franklin Canal is defined and limited by the terms of the contract dated February 18, 1941, between the United States of America, the City of El Paso, and the El Paso County Water Improvement District No. 1, as subsequently modified by the contract of December 1, 1944, between the United States of America, the City of El Paso, El Paso County Water Improvement District No. 1, and Elephant Butte Irrigation District, and by the contract dated August 10, 1949, between the City of El Paso and the El Paso County Water Improvement District No. 1 and specifically that the defendant City of El Paso may not take water from the Rio Grande or from the Franklin Canal except by compliance with the terms and provisions and conditions set forth in such written instruments unless the City's rights in the future be enlarged by subsequent agreements of the parties which shall then control.

(e) That the rights sought to be granted to the City of El Paso by the Board of Water Engineers of the State of Texas on May 8, 1950, as Permit No.

1535 under Application No. 1584, to appropriate public waters of the State of Texas, is subject to the contract of August 10, 1949, between the City of El Paso, and El Paso County Water Improvement District No. 1, as clarified and interpreted by letters dated September 23, 1949, from the Secretary of the Interior to the Mayor of El Paso and General Manager of said Water Improvement District No. 1.

(f) That the City of El Paso may not pump into the Rio Grande above El Paso water from its wells on Project land or from any other source and remove from the river thereafter at its treatment plant or elsewhere the same amount of water pumped into the river without adequate and proper allowance for loss by evaporation, seepage, and transpiration.

(g) That the defendant City is not entitled to take from the bed of the Rio Grande or from the Franklin Canal, without paying for it, an amount of water equal to the amount of sewage which it discharges into the Rio Grande at El Paso, and said defendant is not entitled to take any quantity of water from the river or canal except pursuant to the contracts herein enumerated.

(h) That this Court make a full and complete declaration of the rights of the defendant City of El Paso with reference to its use of water from the Rio Grande.

(i) That the City of El Paso shall not utilize the distribution facilities of the Rio Grande Project for carrying its water supply without authority to do so and specifically, shall not discharge water into the

Vinton River Lateral, the Canutillo Lateral Wasteway, the Vinton River Drain, or Franklin Canal without proper authorization.

Plaintiffs further pray that upon final hearing, the plaintiff El Paso County Water Improvement District No. 1 have and recover of and from the defendant City of El Paso judgment for $2,371.70, with interest thereon at the rate of 6% per annum from February 1, 1952, until paid, together with such additional sums as may be due and unpaid at the time of trial, with interest, and that upon such final hearing, a decree be entered enjoining the defendant City of El Paso, its Mayor, Superintendent of Water Works, and its agents and representatives from taking water from the bed of the Rio Grande or from the Franklin Canal, except to the extent authorized by the contracts set forth in this complaint, in the manner and in accordance with the provisions thereof as found and determined by this Court.

Plaintiffs also pray for recovery of costs herein, and for general relief.

(S.) LOUIS A. SCOTT,
Of the firm of:
BURGES, SCOTT, RASBERRY AND HULSE,
1100 First National Building,
El Paso, Texas.

And

(S.) EUGENE T. EDWARDS,
Of the firm of:
EDWARDS, BELK AND HUNTER.

505 First National Building,
El Paso, Texas.

Attorneys for all Plaintiffs
other than the United
States of America.

CHARLES F. HERRING
United States Attorney for the
Western District of Texas,

HOLVEY WILLIAMS,
Assistant United States Attor-
ney for the Western District
of Texas.

By (S.) HOLVEY WILLIAMS,
(Holvey Williams)
Attorneys for the United
States of America.

FREDERIC K. GRAY,
Regional Counsel, Region 5,
U. S. Bureau of Reclama-
tion of Counsel for the Unit-
ed States of America.

We agree that the foregoing amended complaint by El Paso County Water Improvement District No. 1, et al., as plaintiffs against the City of El Paso as defendant, wherein the United States of America has joined as a party plaintiff may be filed herein and the United States of America and Hudspeth County Conservation and Reclamation District No. 1 originally named as defendants by the plaintiff in the original complaint be dismissed and the costs of making them parties defendant be charged to plaintiff District.

We acknowledge receipt of a copy of the amended complaint and waive any further service thereof on defendants.

ANDRESS, LIPSCOMB & PETICOLAS,
Attorneys for Defendant,
Hudspeth County Conservation and Reclamation District No. 1

By (S.) TED ANDRESS,
(S.) TRAVIS WHITE,
Attorney for Defendant City of El Paso.

AMENDED ANSWER OF DEFENDANT AND COUNTERCLAIM.

(Filed November 17, 1953.)

To the Honorable Court:

With leave of the Court first had, Defendant, City of El Paso, files this its amended answer to the amended complaint of the Plaintiff, United States of America, and Defendant's counterclaim against the Plaintiffs, El Paso Water Improvement District No. 1, and the Plaintiff, United States of America, and would show the Court as follows:

I.

Answering Paragraph numbered I of the amended Complaint, this Defendant admits that this Court has jurisdiction.

II.

Answering Paragraph numbered II of the amended Complaint this Defendant admits all of the allegations therein excepting that it is without knowledge as to the number of riparian landowners whose lands are situated in the valley of the Rio Grande, on the Texas bank thereof, in El Paso County.

III.

This Defendant admits the allegations contained in Paragraph numbered III of the amended Complaint.

IV.

Answerng Paragraph numbered IV of the amended Complaint, this Defendant alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

V.

Answering Paragraph numbered V of the amended Complaint, this Defendant denies the allegations contained therein and alleges that the Rio Grande Compact referred to in Paragraph V of the amended Complaint does not limit the appropriable waters of the Rio Grande in Texas as alleged, but on the contrary, enlarges the amount of water available to the State of Texas and subject to appropriation in the State of Texas by means of permits from the Board of Water Engneers of the State of Texas as authorized under Articles 7467 through Articles 7621 of Vernon's Annotated Texas Civil Statutes.

VI.

Answering Paragraph numbered VI of the amended Complaint, this Defendant denies the allegations contained therein and alleges that the original and amended Complaints of Plaintiffs recognize that the City of El Paso had, prior to 1889 and continuing up to and including July 5, 1939, rights in the waters of the Rio Grande and their flow into the Franklin Canal, and it is further alleged that Plaintiffs admit judicially by Paragraph V of their amended Complaint that waters of the river, including flood or storm waters entering El Paso County and the State of Texas, had not been fully appropriated.

VII.

Answering Paragraph numbered VII of the amended Complaint, this Defendant admits the execution of the franchise of September 16, 1889, and the transfer of December 11, 1913, to the United States of America.

VIII.

Answering Paragraph numbered VIII of the amended Complaint, this Defendant admits that the original franchise from the City of El Paso to the El Paso Irrigation Company of September 16, 1889, expired on July 5, 1939, but denies the validity of the ordinances and quitclaim deeds purporting to convey the right of way occupied by the Franklin Canal to the United States of America, and the authority of the Mayor and City Council at that time to pass said ordinances and execute such deeds; and Defendant alleges that the same were contrary to the Constitution and laws

of the State of Texas and the Charter of the City of El Paso, and in any event that the same were without consideration deemed valuable in law.

IX.

Answering Paragraph numbered IX of the amended Complaint this Defendant denies that the ordinance of September 5, 1939, as amended by the ordinance of November 9, 1939, referred to in Paragraph numbered VIII of the Complaint, and the deed dated November 9, 1939, referred to in Paragraph numbered IX of the Complaint, are valid, and alleges that said ordinances and the deed based thereon referred to are void for the reason that same are ultra vires and based upon no consideration and are contrary to the Constitution and laws of the State prohibiting gifts by municipal corporations and do not comply with the Charter provisions found in Sections 36 and 37 of the Charter of the City of El Paso, and do not come within the Act of the Legislature under which the deed was purported to have been executed.

This Defendant alleges that Section 36 of the Charter provides as follows:

"Whenever application is made to the City Council of the City of El Paso for any grant or franchise, lease or right to use the streets, public highways, thoroughfares or public property of the City of El Paso, as provided for in the preceding section of this Act, before such ordinance or franchise is introduced in the City Council, it shall be published in full in some daily newspaper published in the City of El Paso twice, the first publication being made at least

one week before same is introduced in the City Council. When the same has been passed on its first reading it shall be laid over for at least one week and published in full one time as finally proposed to be passed. . ."

The Defendant alleges that Section 37 of the Charter provides as follows:

"No railroad company, street, stream, nor other kind, no telephone, telegraph, electric light, gas company, nor company of any kind, nor person, no corporation shall ever occupy or use the streets, highways, or public places of the City of El Paso for any purpose whatsoever, without first obtaining the consent of the City Council evidenced by the ordinance duly enacted, and no mere acquiescence or other act or omission of the City Council, or City officers shall be held to confer by estoppel or indirection any such rights and the provisions of this section shall apply to such rights heretofore and now claimed by them."

In further answer to Paragraph numbered IX of the amended Complaint, this Defendant alleges that the Deed referred to in Paragraph numbered IX is invalid, and alleges that the deed is void for the reason that the same is ultra vires and is based upon no consideration and is contrary to the Constitution and laws of the State prohibiting gifts from municipal corporations and does not comply with the Charter provision, Section 35 of the Charter of the City of El Paso.

This Defendant alleges that Section 35 of the Charter provides as follows:

"The right of control, easement, user and the ownership of and title to the streets, highways, public thoroughfares and property of the City of El Paso,

its avenues, parks, bridges, and all other public places and property are hereby declared to be inalienable, except by ordinance duly passed by a vote of three-fourths of all the members of the Board of Aldermen and approved by the Mayor; and no grant of any franchise, or lease or right to use the same, either on, along, through, across, under or over the same to any private corporation or individual shall be granted by the City Council for a longer period than thirty years.

"The City Council may upon its own motion, submit any applications or ordinances requesting the granting of franchises or special privileges in or to the streets, public thoroughfares and highways of the City of El Paso, to an election, at which the qualified ad valorem taxpayers shall vote upon the proposition therein submitted; the expense of which election shall be paid by the applicant or applicants therefor. No such franchise shall ever be granted until it has been read in full at two regular meetings of the Council, nor shall any such franchise, grant, right or easement ever be made to any private individual, corporation, or association unless it provides for adequate compensation therefor, to be paid to the City of El Paso and in addition to any other form of compensation grantee shall pay annually such a fixed charge as may be prescribed in the franchise. Such grant under and any contract in pursuance thereof shall provide that upon the termination of the grant the grant as well as the property if any, of grantee, in the streets, avenues and other public places shall thereupon, without other or further compensation to the grantee, or upon the payment of a fair valuation therefor (the mode of ascertaining which shall be determined in the grant), be and become the property of the City of

El Paso, and the grantee shall never be entitled to any payment or valuation because of any value derived from the franchise or the fact that it is or may be a going concern, duly installed and operated. Every such grant shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates, and to maintain the property in good order throughout the life of the grant."

In further answer to Paragraph numbered IX of the amended Complaint this Defendant alleges that the Plaintiff, United States of America, knew, or should have known, that the Defendant, City of El Paso, had no right, title or interest in such parts of the land occupied by the Franklin Canal and its appurtenances in the public streets and alleys of the City of El Paso, alleging that said Plaintiff knew, by virtue of the franchise previously held that said Franklin Canal was located in parts of the public streets and alleys of the City of El Paso and it is alleged that said Plaintiff knew, or should have known, that said streets and alleys and portions thereof had not been and never have been closed in the manner required by law, and knew that the City of El Paso was not the owner of the fee in said public streets and alleys.

X.

Answering Paragraph numbered X of the amended Complaint, this Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

XI.

Answering Paragraph numbered XI of the amended Complaint, this Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

XII.

Answering Paragraph numbered XII of the amended Complaint, this Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

XIII.

Answering Paragraph numbered XIII of the amended Complaint, this Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

XIV.

Answering Paragraph numbered XIV of the amended Complaint, this Defendant denies each and every allegation contained therein.

XV.

Answering Paragraph numbered XV of the amended Complaint, this Defendant admits the execution of the written contract dated February 18, 1941, but

denies the validity thereof and the authority of the United States of America to enter into such contract, and alleges that if it should be held that the parties had authority to enter into the same, then there was no consideration deemed valuable in law for the same. Defendant, City of El Paso, denies all the remaining allegations contained in said Paragraph XV.

XVI.

Answering Paragraph numbered XVI of the amended Complaint this Defendant admits that a contract dated December 1, 1944, was made, but denies the validity thereof, and denies all the remaining allegations contained in Paragraph numberd XVI.

XVII.

Answering Paragraph numbered XVII of the amended Complaint, this Defendant admits that the Board of Water Engineers of the State of Texas gave to the City of El Paso a permit to take 27,000 acre feet of unappropriated or unused storm, flood and return waters of the Rio Grande, which order was a valid order.

XVIII.

Answering Paragraph numbered XVIII of the amended Complaint, this Defendant denies each and every allegation contained therein and denies that the contract referred to dated October 10, 1949, was and is valid; and alleges that Plaintiff, United States of America was not authorized by law to enter into such contract and in any event that said contract was not based upon any consideration deemed valuable in law.

XIX.

Answering Paragraph numbered XIX of the amended Complaint, this Defendant denies each and every allegation contained therein and alleges that the Plaintiff, United States of America, acting by and through the Secretary of the Interior, was without legal authority to enter into such contract and in any event the same is without consideration deemed valuable in law. Defendant further alleges in answer to said Paragraph XIX that Plaintiffs do not own the Rio Grande and the water therein and denies the ownership by the Plaintiff, United States of America, of that portion of the Franklin Canal wherein the same lies within the public streets and alleys of the City of El Paso.

XX.

Answering Paragraph numbered XX of the amended Complaint, this Defendant denies each and every allegation contained therein.

XXI.

Answering Paragraph numbered XXI of the amended Complaint, this Defendant admits the existence of the contract dated June 22, 1950, but denies the validity thereof and, alleges that Plaintiff United States of America, has no authority to enter into any such contract under the laws of the United States, and further alleges that the Board of Water Engineers of the State of Texas, was not a party to such contract, and that the permit granted to the City of El Paso

by them is in no way subject to any such contract, and that such contract is in no way a part of the order or permit of said Board of Water Engineers and is in nowise binding.

XXII.

Answering Paragraph numbered XXII of the amended Complaint, this Defendant denies the allegations contained therein and alleges that the contract referred to therein, dated November 9, 1939, was and is void and that the City Council and the Mayor of the City of El Paso at that time were without authority under the Constitution and laws of the State of Texas, as well as the Charter of the City of El Paso, to enter into and make such contract, and Defendant alleges that Plaintiffs knew or should have known and are charged with knowledge of the lack of authority of such persons to bind this Defendant.

XXIII.

Answering Paragraph numbered XXIII of the amended Complaint, this Defendant admits the first sentence thereof, but is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence thereof, and denies that said Franklin Canal and system referred to therein is wholly owned by the United States of America, and alleges that said Plaintiffs knew or should have known, and are charged with knowledge, that parts of said Canal are in the public streets and alleys of the City of El Paso and that the same are there simply by sufferance of this Defendant, and Defendant denies all other allegations contained therein.

XXIV.

Answering Paragraph numbered XXIV of the amended Complaint, this Defendant denies all and singular the allegations contained therein and alleges that the Plaintiff, United States of America, had no authority to enter into the contracts and agreements and stipulations set out therein and alleges that the City Council and the Mayor of El Paso were without authority under the Constitution and laws of the State of Texas and the Charter of the City of El Paso to pass the ordinances and the quitclaim deeds of 1939 and denies that it has received any benefits conferred on it by virtue of said deeds contracts, agreements and stipulations referred to therein and alleges that the same were without consideration deemed valuable in law and alleges that the City of El Paso cannot be estopped to deny the validity thereof by reason of the Constitution and laws of the State of Texas and the Charter of the City of El Paso.

For further answer Defendant alleges that the United States of America by and through its fiscal agent, El Paso County Water Improvement District No. 1, has collected and attempted to collect under said contracts sums of money from this Defendant for the use of the Rio Grande, a common carrier and an interstate and international stream and for the use of the Franklin Canal for carriage of waters not in their control nor appropriated by them and for which waters they do not have a valid permit from the State of Texas.

For further answer to said Paragraph XXIV of the amended Complaint, this Defendant says that all of

said contracts are void, invalid and of no force and effect and are unauthorized by the Reclamation Laws of the United States and are not binding upon this Defendant in any event as the same are based upon no consideration deemed valuable in law.

XXV.

Answering Paragraph numbered XXV of the amended Complaint, this Defendant denies each and every allegation contained therein.

XXVI.

Answering Paragraph numbered XXVI of the amended Complaint, this Defendant admits that there is a dispute of both law and facts between the parties and admits that the allegations set forth therein are part of the contentions of this Defendant, but denies that they set forth all of the contentions of this Defendant, which appear in other parts of this Answer, and further this Defendant denies that the contentions of the Plaintiffs set out therein in Paragraph numbered XXVI are correct.

XXVII.

Answering Paragraph numbered XXVII of the amended Complaint, this Defendant admits that it has requested the Plaintiff District and Plaintiff United States of America to construct necessary bridges across the Franklin Canal, but denies that they have any right to the use of the Franklin Canal except by sufferance of this Defendant.

XXVIII.

Answering Paragraph numbered XXVIII of the amended Complaint, this Defendant admits that it intends forthwith to pump and is pumping into the Rio Grande bed such water as is obtainable from wells on irrigable land owned by this Defendant, and this Defendant expressly denies all the other allegations contained in said Paragraph numbered XXVIII.

XXIX.

Answering Paragraph numbered XXIX of the amended Complaint, this Defendant denies each and every allegation contained therein.

XXX.

Answring Paragraph numbered XXX of the amended Complaint, this Defendant denies each and every allegation contained therein.

XXXI.

Answering Paragraph numbered XXXI of the amended Complaint this Defendant denies each and every allegation contained therein.

XXXII.

Answering Paragraph numbered XXXII of the amended Complaint, this Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein excepting that Defendant admits the allega-

tions that the City of El Paso has drilled at least six water wells in its Canutillo Reservoir site and admits that water from these wells flows into the Rio Grande and is diverted into the Franklin Canal and thence to the City's water treatment plant. And the Defendant denies all the allegations contained in said Paragraph XXXII excepting those specifically admitted.

XXXIII.

This Defendant denies all the allegations contained in the Prayer in said amended Complaint.

XXXIV.

This Defendant denies each and every allegation in the amended Complaint, not herein admitted, controverted or specifically denied.

Defenses.

XXXV.

For a first separate and distinct defense, Defendant alleges: Defendant has rights in the waters of the Rio Grande because (a) Under the statutes of Texas, Defendant has title to one-half of the beds and channels, and also of all the abandoned beds and channels of the Rio Grande within the present or future corporate limits of the City, as set forth in Article 7467a of Vernon's Annotated Texas Civil Statutes (1925); (b) The City owns lands which have riparian rights; (c) The privately owned lands lying within the City have riparian rights, and the owners and occupants

of such lands obtain water for domestic use from the municipal water system, in lieu of taking such water directly from the river; (d) The prior right of the inhabitants of the City to water for domestic use was recognized by the United States of America when in 1913 it had assigned to it the rights of the El Paso Irrigation Company. Said original franchise in Section 5 thereof expressly provided that the El Paso Irrigation Company "shall not discriminate in the use or sale of water against the inhabitants of said City of El Paso; but the inhabitants of said city shall have the right to use the water of said canal at reasonable times, by paying therefor, at a rate not to exceed one dollar per annum, per lot of 26 by 120 feet for domestic and irrigation purposes; and for all other purposes may use said water at reasonable times, paying therefor, not to exceed five cents for each one thousand cubic feet of water; and any such discrimination or overcharge shall subject said company to a forfeiture of all rights, grants, franchies, privileges and powers herein conferred." And it is further alleged that the franchise ordinance of December 11, 1913, which amended said original franchise did not in any way change said Section 5 of said original franchise ordinance. It is further alleged that all contracts and ordinances made thereafter, specially the ordinances and deeds of 1939, were passed and made without authority by the persons making same, and it is further alleged that the Plaintiffs knew or should have known that the same were illegal and void and that the City of El Paso retained its rights in the waters of the Rio Grande and in the waters of the Franklin Canal.

XXXVI.

For a second separate and distinct defense, Defendant alleges: That the Plaintiffs jointly assert complete control and ownership of all waters of the Rio Grande including not only water impounded by the Elephant Butte Dam and Caballo Dam, but all storm and flood waters never under control of the District or under the control of the Reclamation Department, and waters which have never been beneficially used by said District or department and which are incapable of being used beneficially by them. Further, Defendant alleges that the Rio Grande Compact entered into on March 18, 1938, and ratified by the States of New Mexico, Colorado and Texas, and consented to and approved by the Congress of the United States, had among its purposes to effect and equitable apportionment of the waters of the Rio Grande between the States, and the same has the effect of limiting the claims of the Plaintiffs, who claim in Paragraph IV of the amended Complaint that the Secretary of the Interior withdrew all of the unappropriated waters of the Rio Grande and its tributaries in New Mexico for direct diversion and for storage. Said Compact apportioned said waters of the Rio Grande equitably among the states and the water proportioned to the State of Texas is under the control and jurisdiction of the Board of Water Engineers of the State of Texas.

XXXVII.

For a third separate and distinct defense, Defendant alleges: That the District or Department has asserted control over the transportation of the water for

the City and has demanded a charge for the use of the river and for water that was never owned by either the Department or the District, and has threatened to prevent the use of the river, which is a common carrier, for transporting water by the City, and has denied the right of the City to drill wells for water and has illegally made charges for the use of equipment and facilities belonging to the United States of America and in nowise paid for by funds of the Reclamation Department or on behalf of the Water District or charged to the Water District, and they have threatened to refuse the use of such facilities in the handling of water needed by the City unless discriminatory charges were paid to the District by the City the District purporting to act as fiscal agent for the Department. It is further alleged that between the years 1942 and up to and including the year 1951 the said District acting as fiscal agent for said Department, has, under the color of the alleged contracts and agreements dated February 18, 1941, December 1, 1944; and August 10, 1949, collected from the City $12,872.22 for the use of such facilities in handling water needed by the City.

XXXVIII.

For a fourth separate and distinct defense, Defendant alleges: There was constructed by the United States Government under the International Boundary Commission, for the people of the United States and to protect the water rights of all the people of the United States, a diversion dam immediately above the city limits of the City of El Paso to transport the water through the canal within the city limits of the City of El Paso in order to prevent unlawful taking

of water by nationals of Mexico. Such facilities were constructed for the use and benefit of the City of El Paso and all other persons who have the right to the use of waters flowing in the Rio Grande. The charges made and demanded by the Water District for the use of the City of these facilities are unauthorized and illegal, and the district threatens, unless discriminatory charges are paid for diverting the water through the canal, to divert waters needed by the City and to which it is entitled, into the river at the diversion point, which would permit appropriation by Mexican nationals. And it is further alleged that said Rio Grande Compact referred to above specially provides in Article 15 that nothing therein shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties and it is alleged that the treaty referred to is the treaty with Mexico of 1906, commonly called the Root Treaty, wherein the United States obligates itself to deliver to Mexico 60.000 acre feet of water per annum.

XXXIX.

For a fifth separate and distinct defense, Defendant alleges that the Plaintiff United States of America has no rights in any of the waters of the Rio Grande under and by virtue of the Reclamation Laws, and it is further alleged that any rights that Plaintiff District has in and to the waters of the Rio Grande is simply under and by virtue of laws of the State of Texas referring to the appropriation of waters, and it is alleged that Article 7471 of Vernon's Annotated Texas Civil Statutes provides that the public welfare requires a declaration of priorities as to the allotment and appropriation of the waters of the State of Texas

and declares the public policy of the State to be that a preference and priority be given to uses in the order named in the statute; the first of which is domestic and municipal uses, including water for the sustaining of human life and domestic animals, placing irrigation third in the preference and priority list; and it is alleged that irrigation is the purpose for which the waters are used and proposed to be used by the Plaintiffs.

XL.

For a sixth separate and distinct defense, Defendant alleges: Plaintiff District through the project facilities collects and stores waters of the Rio Grande, which would otherwise flow freely in the river, and which the City has the right to withdraw and utilize; and Plaintiff District thereby deprives the City of the use of such waters.

XLI.

For a seventh separate and distinct defense Defendant alleges that it restores to the river and project facilities a large quantity of water which has been treated in its sewage treatment plant and is suitable for use by the irrigation project and is so used; but Plaintiff District and the Reclamation Department refuse to give the City credit for such water, and attempt to charge the City for the equivalent amount of water, notwithstanding such equivalent amount is restored.

XLII.

For an eighth separate and distinct defense, Defendant alleges:

(a) The ordinance and deed of November 9, 1939, referred to in Paragraph IX hereof were void for the reasons therein stated; or in the alternative, if the same were valid, they have been breached by Plaintiffs as set forth in Paragraph IX.

(b) The contract of February 18, 1941, referred to in Paragraph XV of the amended Complaint, was void because ultra vires the City and without consideration to support it. And it is further alleged that the Secretary of the Interior was without authority o act for the Plaintiff United States of America.

(c) The contract of December 1, 1941, referred to in Paragraph XVI of the amended Complaint, was void because ultra vires the City and without consideration to support it. And it is further alleged that the Secretary of the Interior was without authority to act for the Plaintiff, United States.

(d) The contract of August 10, 1949, referred to in Paragraph XVIII of the amended Complaint, was void because ultra vires the City and without consideration to support it. And it is further alleged that the Secretary of the Interior was without authority to act for the Plaintiff, United States.

(e) The stipulation of December 1, 1949, referred to in Paragraph XX of the amended Complaint, was

void because ultra vires the City and without consideration to support it.

(f) The contract of June 22, 1950, referred to in Paragraph XXI of the amended Complaint, was void because ultra vires the City and without consideration to support it. And it is further alleged that the Secretary of the Interior was without authority to act for the Plaintiff, United States.

XLIII.

For a ninth separate and distinct defense, Defendant alleges: If the ordinance and deed of 1939 referred to in Paragraphs VIII and IX of the amended Complaint are valid, Plaintiffs are bound by the terms of said ordinance and deed, and the resolution referred to in Paragraph X of the amended Complaint, to provide sufficient bridges over the Franklin Canal at the streets therein named. And it is alleged that the bridges over a number of said streets are insufficient to carry normal traffic across the Franklin Canal; and it is alleged that such bridges are so narrow and inadequate and are incapable of carrying normal day to day traffic and the weight thereof and it is further alleged that said bridges were and are in such condition that normal traffic could not and cannot be carried over the same, considering normal weights of vehicles, and it is alleged that the City of El Paso has erected new bridges across the Franklin Canal wherein said canal lies in the public streets and rights of way at the crossing of Piedras, Copia and Verde Streets at a cost of $51,397.69, after refusal of said District to build the same so as to conform with the normal street traffic requirements over said Canal.

Counterclaim.

XLIV.

Defendant herein repleads all of the allegations contained in Paragraph XXXVII above.

XLV.

Defendant alleges in the alternative that if the ordinance and deed of November 9, 1939, referred to in Paragraphs VIII and IX of the amended Complaint are valid, Plaintiffs are bound by the terms of said ordinance and deed, and the resolution referred to in Paragraph X of the amended Complaint to provide sufficient bridges over the Franklin Canal at the streets therein named. And it is alleged that the bridges over a number of said streets are insufficient to carry normal traffic across the Franklin Canal; and it is alleged that such bridges are so narrow and incapable of carrying normal day to day traffic and the weight thereof; and it is further alleged that said bridges were and are in such poor condition that normal traffic could not be carried over the same, considering normal weights of vehicles; and it is alleged that the City of El Paso has erected new bridges across the Franklin Canal wherein said canal lies in the public streets and rights of way at the crossings of Piedras Copia and Verde Streets at a cost of $51,397.69, after refusal of said district to build the same so as to conform with the normal street traffic requirements over said canal. And in the alternative, if Defendant be mistaken, and said ordinance and deed are void, then the United States and said District are bound to provide sufficient bridges

over the Franklin Canal at all street intersections, because the canal would, without legal right, cut off said streets and interfere with travel and it is further alleged that demand has been made upon said District to construct three bridges at the crossing of Piedras, Copia and Verde Streets, and that said District has failed and refused to do so; and the City of El Paso at the cost of $51,397.69 provided proper bridges at a reasonable cost at said intersections, which cost should be borne by the Plaintiff herein.

Prayer.

Defendant prays that the Court:

(a) adjudge and declare the rights of all parties in the matters in issue in this suit;

(b) issue an injunction against Plaintiffs and their officers against interfering with the City's use of water to which it is entitled;

(c) issue a mandatory injunction against Plaintiffs and their officers commanding them, or either of them, to maintain reasonably adequate bridges at street intersections over the Franklin Canal;

(d) issue a mandatory injunction against Plaintiffs and their officers commanding them to deliver to the City the water to which it is entitled;

(e) grant to Defendant, City, such other relief, against any or all parties as may be appropriate to

make effective the rights of the City declared by the Court;

(f) give judgment in favor of the City for the recovery of all money heretofore paid by the City under the above-described illegal contracts;

(g) and give judgment in favor of the City for the recovery of all money paid by the City for the construction of said bridges to cross the Franklin Canal at the intersections of Piedras, Copia and Verde Streets.

(h) deny the relief prayed by Plaintiffs;

(i) award the City its costs.

(S.) TRAVIS WHITE,
(Travis White),

City Hall,
El Paso, Texas.

(S.) H. E. BROCKMOLLER,
(H. E. Brockmoller),

City Hall.
El Paso, Texas.

(S.) ERNEST GUINN.
(Ernest Guinn),

County Court House.
El Paso, Texas.

(S.) HAROLD L. SIMS.
(Harold L. Sims),

Bassett Tower
El Paso, Texas.

We acknowledge service of a copy of the above Amended Answer and Counterclaim this 17th day of November, 1953.

(S.) EUGENE T. EDWARDS,
Attorney for Plaintiffs, excepting the United States of America,

(S.) HOLVEY WILLIAMS,
Attorney for Plaintiff United States of America.

PLAINTIFFS' REPLY TO THE DEFENDANT'S COUNTER-CLAIM.

(Filed November 25, 1953.)

Plaintiffs, for reply to the counter-claim of the defendant, set forth in Paragraphs XLIV and XLV of the amended answer of defendant and counter-claim, say and present to the Court the following:

First Defense.

The counter-claim fails to state a claim against plaintiffs, or any of them, upon which relief can be granted.

Second Defense.

In reply to Paragraph XLIV of defendant's counterclaim, repleading the allegations contained in Paragraph XXXVII of its answer, plaintiffs say that the plaintiffs have at all times asserted and now assert

that all of the contracts, ordinances and deed, to which specific reference is made in plaintiffs' amended complaint were effective, valid and binding on all of the parties signatory thereto. With this exception, plaintiffs deny all of the allegations of said Paragraph XLIV of the defendant's counter-claim.

Third Defense.

Plaintiffs say that all of the payments made by defendant to plaintiffs, or any of them, were voluntarily made, with full knowledge of all of the facts, and without fraud, deception, duress or coercion on the part of the plaintiffs, or any of them, and further that all of said payments were made by defendant City in recognition of its solemn obligation undertaken by it pursuant to the terms of the contracts of date February 18, 1941, between the United States of America, the City of El Paso, and El Paso County Water Improvement District No. 1, the contract between the United States of America, the City of El Paso, and El Paso County Water Improvement District No. 1, of date December 1, 1944, and the contract of August 10, 1949, between the City of El Paso and El Paso County Water Improvement District No. 1, and the contract of date June 22, 1950, between the City of El Paso and El Paso County Water Improvement District No. 1, and having been so voluntarily made, and pursuant to such contracts, said payments are not recoverable by the defendant herein.

Fourth Defense.

Plaintiffs deny all of the allegations of Paragraph XLV of defendant's counter-claim, and further say

that none of the plaintiffs are under any obligation to furnish funds for the erection of new bridge structures within the City of El Paso. Plaintiffs have maintained the bridges in existence across the Franklin Canal on September 5, 1939, to the extent of their obligation with reference thereto.

Fifth Defense.

The alleged rights of action attempted to be set forth in defendant's counter-claim did not accrue within two years, three years four years, five years, nor ten years next preceding the filing of such counter-claim, and plaintiffs plead the two, three, four, five, and ten year statutes of limitations of the State of Texas, as set forth in Articles 5526, 5526a, 5527, 5529, 5507, 5509 and 5510, Revised Civil Statutes of Texas, in bar of all of defendant's demands.

Wherefore, plaintiffs pray that defendant's counter-claim be dismissed, and that plaintiffs be awarded judgment as prayed in their amended complaint.

(S.) LOUIS A. SCOTT,
Of the Firm of:
BURGES, SCOTT, RASBERRY & HULSE,
1100 First National Building,
El Paso, Texas.

and

(S.) EUGENE T. EDWARDS,
Of the Firm of:
EDWARDS, BELK & HUNTER,
505 First National Building,
El Paso, Texas.

Attorneys for all plaintiffs other than the United States of America.

November 25, 1953. Receipt is acknowledged of three copies of this Reply. Further service thereof is waived.

TRAVIS WHITE H. E. BROCK-MOLLER ERNEST GUINN and HAROLD L. SIMS,

By (S.) TRAVIS WHITE,
Attorneys for Defendant, City of El Paso.

CHARLES F. HERRING,
United States Attorney for the Western District of Texas.

HOLVEY WILLIAMS,
Assistant United States Attorney for the Western District of Texas.

By (S.) HOLVEY WILLIAMS,
Attorneys for the United States of America.

FREDERIC K. GRAY,
Regional Counsel, Region 5, United States Bureau of Reclamation, of Counsel for the United States of America.

Case called for Trial without a Jury;

Colloquy between Court and Counsel;

Excerpts from the Report of the Rio Grande Joint Investigation;

Omitted from the Printed Record, Pursuant to Designations of Counsel as to Printing Record copied at pages 1, et seq.

• • • • • • • •

(EXHIBIT 1-a was thereupon received in evidence by the Court. Entire exhibit is to be sent up as an original to the Court of Appeals by agreement of counsel; however the filings of 1906 and 1908 are to be copied in the record and read in words and figures as follows):

"Department of the Interior
United States Geological Survey
Reclamation Service

Carlsbad, New Mexico, Jan. 23, 1906.

Mr. David L. White,
Territorial Irrigation Engineer,
Santa Fe, New Mexico

"Dear sir:

The United States Reclamation Service, acting under authority of an act of Congress known as the Reclamation Act, approved June 17, 1902 (32 Stat., 388), proposes to construct within the Territory of New Mexico certain irrigation works in connection with the so-called Rio Grande Project. The operation of the works in question contemplates the diversion of water from the Rio Grande River.

Section 22 of Chapter 102 of the laws enacted in 1905 by the 36th Legislature Assembly of the Territory of New Mexico—an act entitled, 'An Act Creating the Office of Territorial Irrigation Engineer, to Promote Irrigation Development and Conserve the Waters

of New Mexico for the Irrigation of Lands and for other purposes,' approved March 16, 1905—reads as follows:

'Whenever the proper officers of the United States authorized by law to construct irrigation works shall notify the territorial irrigation engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated at the date of such notice, shall not be subject to further appropriations under the laws of New Mexico, and no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the territory, except as to such amount of the water described in such notice as may be formally re-leased in writing by an officer of the United States thereunto duly authorized.'

"In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following described waters, to-wit:

A volume of water equivalent to 730,000 acre feet per year requiring a maximum diversion or storage of 2,000,000 (sic) miner's inches said water to be diverted or stored from the Rio Grande River at a point described as follows:

Storage dam about 9 miles west of Engle, New Mexico, with capacity for 2,000,000 acre-feet and diversion dams below in Palomas, Rincon, Mesilla and El Paso Valleys in New Mexico and Texas.

It is therefore, requested that the waters above described be withheld from further appropriations and that the rights and interests of the United States

in the premises be otherwise protected as contemplated by the statute above cited.

Very truly yours,
B. M. HALL,
Supervising Engineer.

Phoeniz, Arizona, April, 1908.

Mr. Vernon L. Sullivan,
Territorial Engineer,
Santa Fe, New Mexico

Dear Sir

Claiming and reserving all rights under our former notice of January 23, 1906, addressed to David L. White, Territorial Irrigation Engineer of New Mexico, which said notice advised him of the intention of the United States to use the waters of the Rio Grande for the purpose of irrigation, and is now filed in your office, I do now hereby give you the following notice in addition to said former notice and supplemental thereto.

The United States acting under authority of an Act of Congress, known as the Reclamation Act, approved June 17, 1902, (32 Stat. 388), proposes to construct within the Territory of New Mexico certain irrigation works in connection with the so-called Rio Grande Project. The operation of the works in question contemplates the diversion of the water of the Rio Grande River.

Section 40 of the Chapter 49 of the laws enacted in 1907 by the 37th Legislative Assembly of the Territory of New Mexico an Act entitled, "An Act to conserve and regulate the use and distribution of the waters

of New Mexico; to create the office of Territorial Engineer; to create a Board of Water Commissioners, and for other purposes", approved March 19, 1907, reads as follows:

Whenever the proper officers of the United States authorized by law to construct works for the utilization of waters within the Territory, shall notify the Territorial Engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated, and not covered by applications or affidavits duly filed or permits as required by law, at the date of such notice, shall not be subject to a further appropriation under the laws of the Territory for a period of three years from the date of said notice, within which time the proper officer of the United States shall file plans for the proposed work in the office of the Territorial Engineer for his information and no adverse claim to the use of the water required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory, except as to such amounts of water described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized: Provided, that in case of failure to file plans for the proposed work within three years as herein required, the waters specified in the notice given by the United States to the Territorial Engineer shall become public water, subject to general appropriations.

In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following described waters, to-wit:

All the unappropriated water of the Rio Grande and its tributaries, said water to be diverted or stored

from the Rio Grande River at a point described as follows:

Storage dam about nine miles west of Engle, New Mexico, with capacity for two million (2,000,000) acre feet, and diversion dams below in Palomas, Rincon, Mesilla and El Paso Valleys in New Mexico and Texas.

It is therefore requested that the waters above described be withheld from further appropriation and that the rights and interests of the United States in the premises be otherwise protected as contemplated by the statute above cited.

Yours very truly,

LOUIS C. HILL,

Supervising Engineer.

* * * * * * * *

(PLAINTIFF'S EXHIBIT 2, being received in evidence, was read by Mr. Edwards, and same is copied into the record, as follows):

"State of New Mexico

(Seal)

Office of the Secretary of State

Certificate

I, Beatrice B. Roach, Secretary of State of the State of New Mexico, do hereby certify that this is a true and correct copy of Section 22 of Chapter 102, Laws of 1905, 36th Legislative Assembly of the Territory of New Mexico, and Section 40 of Chapter 49, Laws of 1907, 37th Legislative Assembly of the Territory of New Mexico, as the same appears on the enrolled and engrossed copy on file in this office.

Given under my hand and the Great Seal of the State of New Mexico, in the City of Santa Fe, the Capital on this 15th day of July, 1952 A. D.

(S.) BEATRICE B. ROACH,
Secretary of State .

(Seal)

"Section 22 of Chapter 102
Laws of 1905
36th Legislative Assembly of the Territory of New Mexico.

Whenever the proper officers of the United States, authorized by law to construct irrigation works, shall notify the territorial irrigation engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated at the date of such notice, shall not be subject to further appropriations under the laws of New Mexico, and no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the territory, except as to such amount of the water described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized.

Section 40 of Chapter 49
Laws of 1907
37th Legislative Assembly of the Territory of New Mexico

Whenever the proper officers of the United States, authorized by law to construct works for the utilization of waters within the Territory, shall notify the territorial engineer that the United States intends to

utilize certain specified waters, the waters so described, and unappropriated, and not covered by applications or affidavits duly filed or permits as required by law, at the date of such notice, shall not be subject to a further appropriation under the laws of the Territory for a period three years from the date of said notice, within which time the proper officers of the United States shall file plans for the proposed work in the office of the territorial engineer for his information, and no adverse claim to the use of water required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory, except as to such amount of the water described in such notice as may be formally released in writing by an officer of the United States, thereunto duly authorized; Provided, That in case of failure to file plans of the proposed work within three years, as herein required, the waters specified in the notice given by the United States to the territorial enginer shall become public waters, subject to general appropriations."

* * * * * * * *

Note

Pages 87 - 90 are on card 3.

(Plaintiff's Exhibit 4 was thereupon received in evidence by the Court and reads in words and figures as follows—with photostatic copies of three maps included as part of same):

"P-4".

State of Texas,
County of Travis.

I, Audrey Strandtman, Secretary of the Board of Water Engineers for the State of Texas, do hereby certify the attached to be a true and correct photostat of Certified Filing No. 123, now shown in the records of the Board of Water Engineers to be owned by the U. S. Bureau of Reclamation, El Paso, Texas, and recorded in Certified Filing Book No. 2, Pages 3 to 16, inclusive.

Given under my hand and the seal of the Board of Water Engineers for the State of Texas, this the 16th day of December, A. D. 1952.

(S. AUDREY STRANDTMAN,
(Audrey Strandtman),
(Seal) Secretary, Board of Water Engineers.

County of El Paso,
State of Texas. ss.

For the purpose of information and in compliance with the provisions of Chapter 171, General Laws of the State of Texas, 33rd Regular Session of the Legislature, so far as may be, but without waiving any rights of the United States, or its successors in control of any of the works hereinafter mentioned, by reason of this compliance with said provisions, this state-

ment is made by and on behalf of the United States of America, that is to say—

1. There is hereto attached, marked Exhibit 1, a certified copy of the statements heretofore filed for record in the office of the County Clerk of the County of El Paso, Texas, attached to which is a true copy of the map attached to the original statement filed as aforesaid.

2. That the said 'El Paso Irrigation Canal' and system as now constructed consists of 30 miles of main canal, main headgate or intake, desaguas, checks, headgates for deliveries to laterals, drops, etc., and that all of the works have been completed. Said canal and system is now owned by the United States of America; has been by the United States altered, enlarged and repaired as shown on map hereto attached, marked Exhibit 2; and is now known as the Franklin canal and system of the Rio Grande Project.

3. That all portions of said works are in use and no part of said works is in possession of the United States and not in actual use.

4. That the amount and volume of water actually taken, diverted or used through said works is 150 second-feet, diverted through the irrigation season from February 15 to October 15 of each year whenever that amount of water is available in the river. That said water so taken and diverted is used principally for irrigation, a small portion thereof is used for domestic purposes.

5. That the amount of water that has been diverted, taken and used in each year since the acquisition and ownership of said canal by the United States, has been approximately 70,000 acre-feet per annum and the same has been diverted, taken and used for the purposes as above mentioned.

6. That there is hereto attached, marked Exhibit 3, a list giving, as near as may be, the description and area of the lands heretofore and now being irrigated from said canal and system, and the number and names of the water users and consumers of water during said period.

7. That the local address of the officer in charge of said project is L. M. Lawson, Project Manager, United States Reclamation Service, El Paso, Texas.

Dated May 18, 1914.

THE UNITED STATES OF AMERICA.

By (S.) L. M. LAWSON.
Project Manager of U.S.R.S. Rio Grande Project, N. Mexico-Texas.

State of Texas,
County of El Paso. ss.

L. M. Lawson, being first duly sworn says that he is Project Manager of the Rio Grande project, New Mexico-Texas, and makes this affidavit for and on behalf of the U. S. Reclamation Service; that he has read the above and foregoing statement of appropriation, etc., and is familiar with its contents, which are

true of his knowledge, except such matters as are stated upon information and belief and that as to such matters he verily believes them to be true.

Witness my hand this 18th day of May, 1914.

(S.) JESSIE E. M. HOWE,
Notary Public in and for El Paso County, Texas.

(Seal)

My commission expires June 1, 1915.

Exhibit 1.

A. M. Loomis,
S. W. Russell,
R. L. Mayer,
A. Blacker,
E. S. Newman,
S. G. Etheridge,
W. M. James,
J. W. Eubank.

The State of Texas,
County of El Paso.

We the undersigned, residents of the State and County aforesaid, for ourselves and assigns, have appropriated, and do hereby appropriate out of the unappropriated waters of the Rio Grande all the water necessary for irrigation and for domestic purposes, and for mining and milling and stock raising along the line of our projected Canal, beginning at a point hereinafter specifically described, at or near El Paso, El Paso County, Texas, and terminating at Fabens

in said County, according to the maps of J. W. Eubank, Civil Engineer hereto attached and made part hereof, and filed together with this Statement, in the office of the County Clerk of said El Paso County, on Saturday, the sixth day of July, A. D. 1889, under an "Act to Encourage Irrigation"&c, passed by the Legislature of Texas, and approved March 19th, 1889, and to be found on pages 100, 101, 102 and 103 of the General Laws of the Twenty First Legislature.

The purposes of this appropriation and designation are for the constructing, maintaining and operating said Canal and ditches, flumes, feeders, laterals, reservoirs, wells and telephone line, connected with said main line; and of conducting, transferring and furnishing water to all persons entitled to the same along the line of said Canal for irrigation and domestic uses, and for mining, milling and stock raising, at such prices, and in such manner, and according to such system of measurement as may be determined best by our Association, under said Act of the Legislature, including also the building of storage reservoirs connected with said Canal system.

We therefore for ourselves and assigns aforesaid, in compliance with said Act of the Legislature do hereby designate the name of said Canal to be the "El Paso Irrigation Canal", the Head Gate of which said Canal is particularly described as follows:

Being in the State and County aforesaid and at a point of rock six hundred and fifty feet up the River from the Santa Fe Railway Well, and at or near the East bank of the Rio Gra . in the City of El Paso, in said County and State, also marked by a stone mound on the said point of rock, the width of which said Head Gate is forty feet: thence running along

the bank of the Rio Grande in a South Easterly course having a depth of three feet, or a carrying capacity of three feet and a width of forty feet to Eighth Street according to the map of Campbells Addition to the City of El Paso; thence in an Easterly direction thro' said City, on the most practicable route to the Eastern boundary line of said City; thence in a South Easterly direction on the most practicable route, and according to the maps of said route, marked "A" & "B", hereto attached to Fabens in said County.

The undersigned appropriators further state that the width of said projected Canal is forty feet, and the depth is three feet with the right, under said Act of the Legislature, to claim, purchase and condemn one hundred feet in width right of way for said Canal.

That the carrying capacity of said Canal is eighty one and three tenths feet per second of time; that the name of the stream from which said water is taken is the Rio Grande, that work was commenced on the sixth day of July A. D. 1889, that the owners of said Canal are the following named persons, to wit: A. M. Loomis, S. W. Russell, R. L. Mayer, A. Blacker, E. S. Newman, S. G. Etheridge.

And that said Appropriators herewith file maps "A" & "B" showing the route of said Canal. And ask that the same be filed and recorded as required by law.

A. M. LOOMIS.
A. W. RUSSELL.
R. L. MAYER.
A. BLACKER.
E. S. NEWMAN.
S. G. ETHERIDGE.
W. M. JAMES.
J. W. EUBANK.

The State of Texas,
County of El Paso.

Before me, W. B. McLachlen, a Notary Public in and for the County of El Paso and State Aforesaid, personally appeared A. M. Loomis, S. W. Russell, R. L. Mayer, A. Blacker, E. S. Newman, S. G. Etheridge, W. M. James, and J. W Eubank and who were duly sworn by me, and who, under their oaths aforesaid, respectively stated to me that the facts contained in the foregoing statement to which they have subscribed their names respectively, are true.

Given under my hand and seal of office this 6th day of July A. D. 1889.

W. B. McLACHLEN.
Notary Public, El Paso Co., Texas.

(L. S.)

Filed July 6, 1889 at 12 o'clk M. Recorded September 14, 1889.

B. G. THOMAS,
Co. Clk.,
By M. J. CLARK.
Dep.

The State of Texas,
County of El Paso.

I, Park W. Pitman, Clerk of the County Court of El Paso County, Texas, do hereby certify that the foregoing is a true and correct copy of the Sworn Statement & Appropriation for "El Paso Irrigation Canal", dated the 6th day of July 1889, as the same appears of record in Book 1, Page 1, of the Record of Irrigation Ditches, of said County.

Given under my hand and the seal of said Court, at office in El Paso, Texas, this the 2nd day of May, A. D. 1914.

Attest:

PARK W. PITMAN,
County Clerk,
By (S.) M. I. FERRY,
Deputy.

A. M. LOOMIS,
S. W. RUSSELL,
R. L. MAYER,
A. BLACKER,
E. S. NEWMAN,
S. G. ETHERIDGE,
W. M. JAMES,
& J. W. EUBANK.

The State of Texas,
County of El Paso.

We the undersigned, residents of the State and County aforesaid, for ourselves and assigns, have appropriated, and do hereby appropriate out of the unappropriated waters of the Rio Grande, all of the water necessary for irrigation and domestic purposes, and for mining, milling and stock raising, along the line of our projected canal, beginning at a point hereinafter specifically described, at El Paso, El Paso County, Texas, and terminating at Fabens in said County, according to the map of J. W. Eubank, Civil Engineer, heretofore, on the 6th day of July filed 1889, (filed with the Statement of Appropriation by the undersigned, and of which this is an amendment), in the office of the County Clerk of said El Paso

County, under an Act to encourage Irrigation, etc. passed by the Legislature of Texas and approved March 9, 1889, and to be found on pages 100, 101, 102, and 103 of the General Laws of the 21st Legislature.

The purposes of this appropriation and designation are for the constructing, maintaining and operating said Canal and ditches, flumes, feeders, laterals, reservoirs and wells connected with said main line, and of conveying, transferring and furnishing water to all persons entitled to same along the line of said Canal for irrigation and domestic uses, and for mining, milling and stock raising, at such prices and in such manner and according to such system of measurement as may be determined best by our association under the said Act of the Legislature, including also the building of storage reservoirs connected with said Canal System.

We therefore for ourselves and assigns aforesaid in compliance with said Act of the Legislature do hereby designate the name of said Canal to be the El Paso Irrigation Canal, the head gate of which said Canal is particularly described as follows: being in the State of Texas and County aforesaid and at a point of rock, six hundred and fifty feet up the river from the Santa Fe Railway Well in the City of El Paso, also marked by a stone mound on the said point of rock. The width of said head gate is forty feet; thence continuing said Canal along the bank of the Rio Grande in a South Easterly course, having a depth of three feet or a carrying capacity of three feet, and a width of forty feet to Eighth Street according to the map of

Campbell's Addition to the City of El Paso; thence in an Easterly direction thro' said City on the most practicable route to the Eastern boundary line of said City; thence in a South Easterly direction on the most practicable route, and according to the maps of said Route marked "A" & "B" attached to the original Statement and Appropriation, filed on the 6th day of July last, to Faben's in said County.

The undersigned further state that the width of said projected Canal is not to exceed forty feet, with the right of way, under the Act of the Legislature to purchase, claim and condemn one hundred feet in width right of way for said Canal. That the carrying capacity of said Canal is three hundred and thirty three cubic feet per second of time. That the name of the stream from which said water is taken is the Rio Grande. That the work was commenced on the ... day of July, A. D. 1889. That the owners of said Canal are the following named persons, to wit: A. M. Loomis, S. W. Russell, R. L. Mayer, A. Blacker, E. S. Newman, and S. G. Etheridge and said appropriators herewith adopt and confirm the appropriation and route of said Canal, heretofore made and filed as aforesaid and file this as an amendment and re-appropriation, and ask that the same be recorded as required by law.

Witness our hands this 29th day of July A.D. 1889.

A. M. LOOMIS.
S. W. RUSSELL.
R. L. MAYER.
A. BLACKER.
E. S. NEWMAN.
S. G. ETHERIDGE.
W. M. JAMES.
J. W. EUBANK.

The State of Texas,
County of El Paso.

Before me, W. B. McLachlen, a Notary Public in and for El Paso County, Texas, on this day personally appeared A. M. Loomis, S. W. Russell, R. L. Mayer, A. Blacker, E. S. Newman, S. G. Etheridge, W. M. James & J. W. Eubank, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 1st day of August, A.D. 1889.

W. B. McLACHLEN,
Notary Public, El Paso Co.
Texas.

(L.S.)

Filed August 10th, 1889 at 10 o'clk A.M. Duly recorded September 24th, 1889.

B. G. THOMAS,
Clk.,
By M. J. CLARK,
Dep.

The State of Texas,
County of El Paso.

I, Park W. Pitman, Clerk of the County Court of El Paso County, Texas, do hereby certify that the foregoing is a true and correct copy of the Amended Statement of Appropriation, El Paso Irrigation Canal, filed August 10, 1889, as the same appears of record

in Book 1, Page 6, of the Record of Irrigation Ditches of said County.

Given under my hand and the seal of said Court at office in El Paso, Texas, this the 2nd day of May A.D. 1914.

Attest:

PARK W. PITMAN,
County Clerk,
By (S.) M. I. FERRY,
Deputy.

Note

Pages 103 - 105 are on card 3.

Name	Lots	Acres
Abbott, W. G.		8
Acosta, Leopoldo		105
Akers, J. B.		48
Akers, J. B.		10
Alaniz, Maria	1	
Alba, Refugio		9¾
Albillar, Pedro		3
Alderete, Benigno		100
Alderete, F. G.		5
Alderete, Josephine		5
Alvarado, Ignacio		3
Alvillar, Juan	4	
Apodaca, Anaclete		17
Apodaca, Antonio		6
Apodaca, Antonio		4
Apodaca, Brigido		4.5
Apodaca, Elzario		2
Apodaca, Eugenio		1
Apodaca, Francisco		1
Apodaca, Juan		1¾
Apodaca, Patricio		3
Apodaca, Pedro		4
Apodaca, Precilanio		2.5
Apodaca, Rafael		2
Apodaca, Ramon		13.5
Apodaca, Tomas		8
Apodaca, Z.		25
Apodaca, Zacarias		29
Apodaca, Zacarias		2.5
Apodaca, Zacarias		9.5
Ardoin, C. W.		80
Arellanes, Jose		¼
Arias, Albino		5
Arias, J. H.	2	

Name	Lots	Acres
Arias, Ramon		10
Armenta, Ildefonso		6
Armenta, Ildefonso		7.5
Armenta, Ildefonso		3
Armenta, Santiago		4
Atlir, John	7	
Aubrey, S. C.		12
Baca, D.		15
Bahr, Mrs. F.	2	
Baker, W. M.		5
Baltierra, Arcadio	1	
Barela, Jose		2
Barela, Navarano		2
Barnett, E. A.	1	
Barrios, Leonardo		15
Bassett, C. N.		110
Bates, J. R.		18
Beltran, Felipe		6
Beltran, Francisco M.		6
Bird, H. B.		14
Blair, Joseph	4	
Blanchard, B. H.		¼
Boothe, Nóra		25
Borunda, Pedro		36
Bowers, D. W.		20
Bowington, K. N.		100
Boyle, N. C.		4
Bradt, J. N.		25
Brown, Jas. R.	1	
Buchanan, Geo.		14.5
Buchanan, James		¼
Burrus, Joseph		5

Name	Lots	Acres
Burrus, Joseph		8
Burrus, Louis		25
Burrus, Louis		10
Cadena, C.		45
Cadwallader, M. L.		29
Calderon, Elefonso		6
Camp, H. D.		125
Campbell, Mrs. A. V.		28
Candelaria, Clemente		2
Candelaria, F. G.		2.5
Candelaria, F. G.		3
Candelaria, Jesus		5
Candelaria, Luis		2
Candelaria, Luz		1.5
Candelaria, Luz		10.5
Carbajal, A. B.		5
Carbajal, A. B.		4
Carbajal, A. B.		10
Carbajal, Estanislado		9
Cardona, Cruz		4.5
Carmona, Amado		12
Carmona, Amado		40
Carpenter, S. S.		52
Carr, Bob		20
Carr, S. W.		60
Carr, Sam		20
Carrasco, Jesus	3	
Carrera, Hilario	1	
Casillas, Manuel		9
Castenado, Daniel		44
Castenado, Guadalupe		15
Castillo, Marcos	1	

Name	Lots	Acres
Castillo, Refugio R.		1.5
Castor, Maggie		1
Castro, Miguel		7
Castro, Panfilo		5
Celum, Albert H.		25
Celum, George		15
Celum, John		15
Celum, Sam		25
Chabes, Ynese Apodaca de		1.5
Chavez, Andres		13
Chavez, Aurelio		8
Chavez, Francisco		21
Chavez, Jose		2.5
Chavez, Jose		7
Chavez, Miguel		11
Cravez, Santiago		7
Chavez, Serapio		2
Chavez, Serapio		1.5
Cheek, Mrs. J. S.		30
Clark, G. P.		17.5
Clayton, W. J.		10
Clements, Geo. H.		30
Clifford Bros.		37.5
Cobb, Z. L.		5¼
Cobb, Z. L.		60
Cobos, Jesus		3
Coffin, C. O.		40
Coffin, C. O.		100
Coffin, C. O.		90
Coker, J. M.		50
Cole, Robt. F.		30
Cole, Robt. F.		30
Coles, J. F. & A. P.		25

Name	Lots	Acres
Coles, O. C.		17.5
Colman, Arcadio	1	
Colmenero, Miguel		4
Conway, D. M.		20
Cooper, J. M.		18
Cooper, J. M.		13
Cordova, A. F.		11
Cordova, Francisco		10
Cordova, J. N.		12
Cordova, J. N.		3.5
Cordova, J. N.		3.5
Cordova, J. N.		4
Cordova, J. N.		0¾
Cordova, J. N.		17.5
Cordova, J. N.		4.5
Corrasco, Pedro		50
Crawford, H. E.		10
Crawford, W. C.		10
Crockett, A. J.		45
Crozier, Mrs. E. M.		1.5
Curtis, L. L.		12
Dannenburg, H	2	
Davis, Chas.		4
Davis, Lamar		20
Davis, L. & Celum, A. F.		150
Davis, R. H.	5	
Davis, Waters		5
Derma, Gregorio		4
Diaz, Diego		4
Diaz, Ramon		3
Dominguez, Demetrio		4
Dominguez, Demetrio		24

Name	Lots	Acres
Dominguez, Demetrio		5
Dominguez, Jesus		1.5
Dominguez, Lauro		3
Dominguez, Lauro		14
Dorbandt, Robt. L.		45
Duarte, Jose		1
Dunne, Joe		6.5
Duran, Dolores	1	
Duran, Felipe		15½
Duran, J. M.		7
Duran, Jose	1	
Duran, L. V.		½
Duran, Pablo		4
Duran, Zacarias		½
Elam, C. E.		30
Elam, J. H.		25
Elenes, Mariano		10
Elenes, Pedro		30
Elenes, Pomposo		2
Elias, E. E.		1
Escajeda, J. A.		10
Escontrias, Silverio		5
Escontrias, Silverio		35
Escontrias, Silverio		12
Eubank, J. H.		½
Eubank, J. W.		35
Faver, J. R.		70
Faucher, E. E.		100
Fanez, J. Ross		45
Farrabee, J. V.	2	
Fisk, J. R.		25
Flores, Manuel E.	4	

Name	Lots	Acres
Flores, Nicolas		3
Foix, L. A.		3½
Foote, Mrs. Belle		11
Frias, Aniceto		7
Frias, Guadalupe		5
Frias, Jose		22
Gaal, I. G.		140
Galaviz, P. F.		1.5
Galindo, Martin		2.5
Gallegos, Nicanor		29
Garcia, Adrian		8
Garcia, Agustin		1.5
Garcia, Desiderio		¼
Garcia, Eutimio		20
Garcia, Felix		5
Garcia, Fermin		8
Garcia, Genero		3
Garcia, Genaro		33
Garcia, Pablo		0¾
Garden Improvement Co.		20
Garza, Jose		10
Gaul, H. F.		20
George, Mrs. Laura C.		20
Gibbs, J. W.		5
Gilbert, H. G.		6
Gomez, Juan		1
Gomez, Luisa		3
Gomez, Luisa		5
Gomez, Luisa		2.5
Gonzales, Encarnacion		1
Gonzales, Francisco		2.5
Gonzales, Ignocento		4
Gonzales, Jesus		3

Name	Lots	Acres
Gonzales, Jose		3
Gonzales, Jose		6
Gonzales, Miguel		2
Gonzales, Miguel		3
Goss, Wm. D.	5	
Granillo, Weneslan		½
Graves, Milton S.		4
Graves, Milton S.		20
Gray, H. J.		5
Guebara, Frank		50
Guen, Quong Sing		4
Guereque, Jose		4
Guerra, Andres		16
Guerra, Esteban		3
Guerra, Francisco		7.5
Guerra, Gabriel		3.5
Guerra, Jesus		10
Guerra, Jesus		1
Guerra, Jesus M.		1
Guerra, Jose		4
Guerra, Jose R.		3
Guerra, Tomas		60.25
Hanson, Miles		15
Hardie, Elizabeth Goodin		30
Harm, J. W.	2	
Harris, Eugene L.		5
Harris, F. H.		50
Harris, F. E.	1	
Harris, John N.		1
Harris, John N.		8
Hartman, Donald	4	
Haskins, W. J.	2	
Heid, E S.	3	

Name	Lots	Acres
Hernandez, Antonio	2	
Hernandez, Antonio		1.5
Hernandez, Florencio		2.5
Hernandez, G.		3
Hernandez, G.		25
Hernandez, G.		18
Hernandez, Jose		6
Hernandez, Primitibo		1
Hernandez, Telesforo		1
Herrera, Cresencio		5.5
Herring, Henry L.		30
Hoenes, Gustave C.		2
Hoenes, Gustave C.		1
Holt, C. C.		4
Holt, C. C.		13
Hop, Look		10
Hopkins, C. G.		4
Horn, A. M.	2	
Hughes, J. N.		8
Hunt, Chas. F.		1.5
Interurban Improvement Co.		10
Interurban Improvement Co.		5
International Improvement Co.		50
Irwin, W. W.		55
Jackson & Winder		4
Jakes, Jose		2
James, O. B.		20
Jenson, H.		22
Jones, Cyrus H.		8.5
Jones, Robet.		15
Jungjohann, Marcus		150
Jurado, Creseneio		5

Name	Lots	Acres
Keener, L. M.	4	
Keller, J. U.	2	
Kellog, C. E.		80
Kellog, C. E.		25
Kelly, Petra G. Vda. de		1
King, C. A.		43
Knoblauck, G. F.		1
Knoblauck, C. F.		35
Kraksouer, A.		100
Krauzthor, S.		26
Lander, Robt.		4
Lara, G.		15
Lara, Ramon		2
Lara, Ramon		3
Lara, Ramon		6
Latta, W. B.		65
Leavell, C. H.		40
Lee, Sing		15
Lemley, Fred G		30
Lemley, & Schwabe		38
Lincott, F. M.	1	
Littlejohn, W. W.	2	
Loewenstain, Isaac		25.5
Loewenstain, Isaac		4.75
Loewenstain, M.		0.5
Long, R. W.		40
Loomis, Laura A.		80
Loomis Farm Co.		125
Loomis & Knollenberg		40
Lopez, Alejo		5
Lopez, Felipe		5
Lopez, Martina		5
Lopez, Martina		40

Name	Lots	Acres
Lopez, Naciaseno		2.5
Lopez, Pablo		8.5
Lopez, Porfirio		5
Losano, Jose		8
Lott, Paul S.		2
Love, R. W.		50
Love, R. W.		100
Loya, Antonio		½
Loya, Francisco		1
Loya, Gilberto		4
Loya, Santos		5
Lucero, Luz		3
Lujan, Dolores de		2
Lujan, Jose Angel		1.5
Lujan, Julian		3.5
Lujan, Martin		6.5
Lujan, Pablo		15
Lujan, Romaldo		8
Lujan, Seferino		4
Luna, Amado		13
Luna, Elizario		8
Luna, Jose		10
Luna, Luis		1
Lusero, Federico	1	
Lusero, Marcos		6
McCarty, Miss Stella	1	
McCombs, Bessie		80
McCracken, Wm. C.		1
McDonald, W. A.	1	
McDaniel, John S.		45
McElrain, F. D.		7
McElrain, F. D.		10
McGonagill, J. A.		55

Name	Lots	Acres
McKenney, H. F.		6
Macias, Jose	3	
Madrid, Dario		4
Madrid, Dario		1
Madrid, Maximo		13
Madrid, N. M.		2
Madrid, Nicolas		2
Madrid, Nicolas		½
Madrid, Nicolas		2
Madrid, S.		3
Madrid, Silberio		14
Maese, Eduardo		9
Maese, Francisco	1	
Maldonado, Abel		2
Maldonado, Maurício		11.25
Marks, H. C.		6
Marquez, Antonio		10
Marquez, Gabino		18
Marquez, Santiago		5
Marquez, Santiago		3
Marquez, Damasio		3
Marrujo, Jose		1
Martin, Mrs. Grant	6	
Martinez, Felix	8	
Martinez, Felix		16
Mauer, Ed.		28
Mendez, Alberto		½
Mendez, Alberto		½
Mendez, Pedro		1
Mendoza, Jose		1
Miller, Mrs. G. A.	2	
Millican, Ed. L.		4
Mock, F.		25
Montes, Cornelio		5

Name	Lots	Acres
Montes, F. E.		9
Montgomery, G. G.	3	
Montoya, Alejandro	1	
Montoya, Concepcion		2
Montoya, Eugenio		3
Montoya, Gabino		3.5
Montoya, Juan		2
Moon, Wm.		50
Moon, Wm.		7
Morales, Hegino		4
Morales, Porfirio		23
Moremen, R.		1.5
Morgar, W. E.		40
Mueller, Edward		8
Munoz, Anastacio		10
Munoz, Francisco		20
Munoz, Francisco		2
Munoz, Marcelino		5
Munoz, Mariana R.		2.5
Munoz, Mariana R.		8
Munoz, Pancho		1
Murphree, J. Reed		25
Naranjo, Teofilo		2
Naranjo, Teofilo		4
Nava, Albino		3
Nava, Albino		1.5
Newman Inv. Co.		200
Nichols, L. W.		5
Nichols, R. L.		9
Nieto, Eutimio		20
Nervell, J. M.	2	
Nunoz, Valentine		15
Nusbaum, John H.		8

Name	Lots	Acres
Olguin, Andres		19¾
Olguin, Apolonio		4.5
Olguin, Francisco		3
Olguin, Jesus		1
Olguin, Jesus		2
Olguin, Jesus		1
Olguin, Jose B.		0.5
Olguin, Jose Maria		5.5
Olguin, Librio		1
Olguin, Librato		5
Olguin, Miguel		12
Olguin, Nicolas		23
Olguin, Pedro		2
Olguin, Sabas		6
Olguin, Santa Cruz		7.5
Olguin, Silbestre		2
Olguin, Teofilo		27
Olivas, Gorgonio		2
Oliver, Geo. B.		15
Orndorff & DeGraff		250
Ortega, Gabino		2
Ortega, Manual		1
Padilla, Gabriel		1.5
Padilla, Jesus		7
Paget, J. H.		40
Para, Manuel		3.5
Payne, W. F.		3
Paz, Luis		2
Pedregon, Catarino		18
Pedregon, Cipiano		16
Pedregon, Diego		1
Pedregon, Diego		15
Pedregon, Julian		5

Name	Lots	Acres
Pedregon, Julian		.20
Pedregon, Romulo		38.5
Pedregon, Romulo		10
Pence, Geo.		11
Pendell, Geo.		185
Peterman, Percy		5
Perters, W. L.		45
Peterson, E. J.	5	
Pickering, W. J.	6	
Placencia, Concepcion		10
Porcher, J. S. & Son		69
Porcher, J. S. & Son		5
Porcher, T. Davis		10
Porter, Phil		15
Portillo, Trinidad		1¼
Powers & Truesdall		70
Priest, Mrs. A. H.		10
Provencio, A. H.		13
Provencio, Eulogio		1
Provencio, Jose		5
Provencio, Jose		½
Provencio, Jose Maria		14
Provencio, Ortiz D.		11
Provencio, Ramon		7
Quiroz, Jesus		4½
Ramos, Pedro		5
Ramos, Pedro		6
Rand, Manuel		½
Regalado, Felipe		2½
Regalado, Isidora		1.5
Reid, John L.		1
Resendez, Manuel	1	

Name	Lots	Acres
Revell, Mrs. H. E.		11
Revell, Mrs. H. E.		15
Rey, Jose		4
Ribera, Sabas		1.5
Richardson, Robt. P.		65
Rodela, Jose L.		11¼
Rodela, Refugio		6
Rogers, J. A.		2½
Romero, Clofis		4
Romero, Paulo		6
Rosalez, Anastacio	1	
Rosedale Farm		232
Ross, F. E.		1
Rubio, Encarnacio		4
Ruedas, Tomas		1
Ruedas, Tomas		4
Ruedas, Tomas		2
Ruiz, Herminio		3
Rumsey, Mrs. Georgia A.		3
Ruvar, Olssew & Seffer	3	
Salazar, Merced		3
Saldona, Leonardo		15
Sambrano, E.		40
Sanchez, A. O.		5
Sanchez, O. A.		11
Santana, Ignacio		4
Schairer, K. G.		6
Schairer, K. G.		200
Schairer, S. G.		116
Schubert, John		15
Seniseroz, Miguel		1.5
Serna, Catarino		½
Serna, Esteban		3¾

[redacted]

HART-PRE-N° 2

HART - N° 3

Rio Grande

N

Exhibit A.

[redacted]

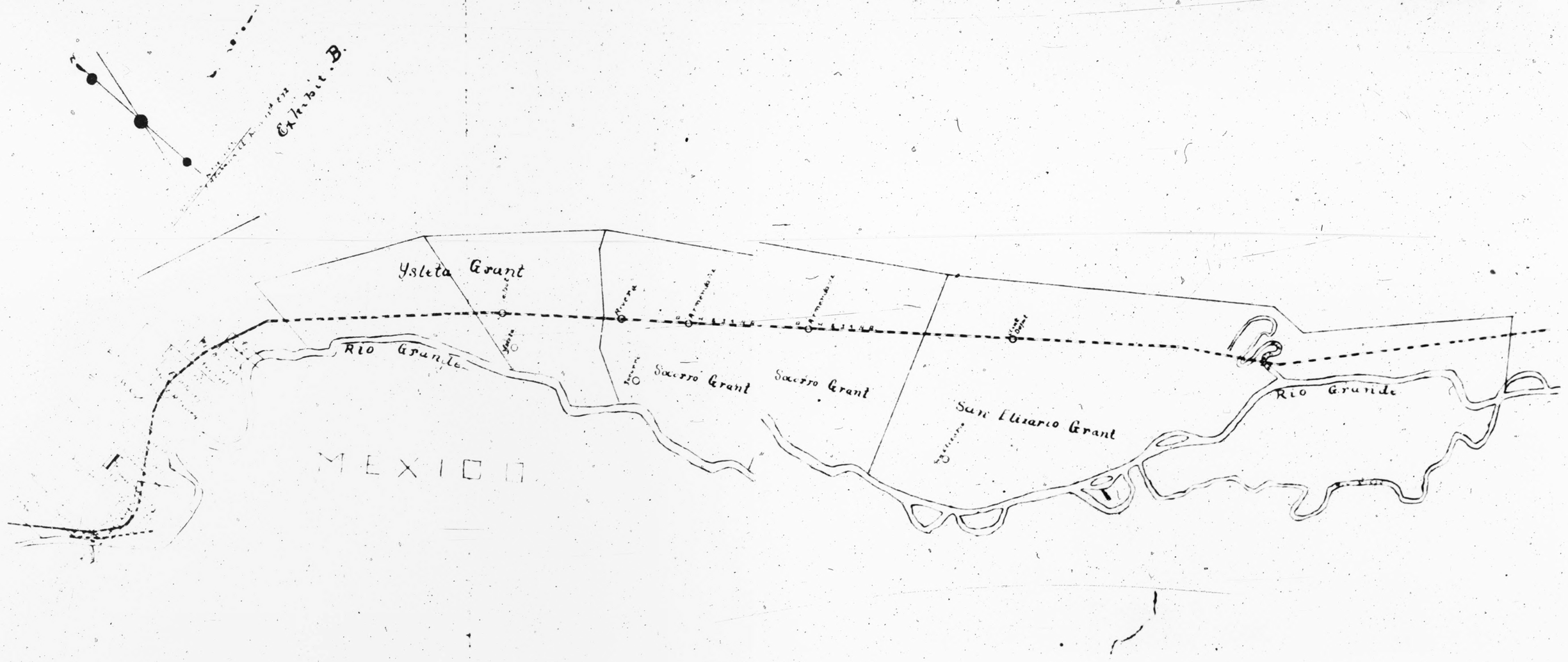


Exhibit B.
Ysleta Grant
Rio Grande
Sacorro Grant
Sacorro Grant
San Elizario Grant
Rio Grande
MEXICO

105

Map (RG 54)

"P-4" (CONT.) MAP (RG264)

UNITED STATES RECLAMATION SERVICE

EL PASO VALLEY

T E X A S

N

NEW MEXICO

EL PASO

ALFALFA

SAN JOSE

YSLETA STA. 780

BELEN

CLINT

CUADRILLA

TABENS

CANAL

EL CORRO

RIO GRANDE

SAN ELIZARIO CANAL

SALADO

FRANKLIN CANAL

JUAREZ

SAN ELIZARIO

MON. NO. 2

INTERNATIONAL BOUNDARY

ISLAND

TEXAS

GUADALUPE CANAL OF SAN ELIZARIO

M E X I C O

STATE OF CHIHUAHUA

Convention between the United States and Mexico providing for the equitable distribution of the waters of the Rio Grande for irrigation purposes. Signed at Washington, May 21, 1906; ratification advised by the Senate, June 26, 1906; ratified by the President, December 26, 1906; ratified by Mexico, January 5, 1907; ratifications exchanged at Washington, January 16, 1907; proclaimed, January 16, 1907.

May 21, 1906.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Preamble.

Whereas a Convention between the United States of America and the United States of Mexico, providing for the equitable distribution of the waters of the Rio Grande for irrigation purposes, and to remove all causes of controversy between them in respect thereto, was concluded and signed by their respective Plenipotentiaries at Washington on the twenty-first day of May, one thousand nine hundred and six, the original of which Convention, being in the English and Spanish languages, is word for word as follows:

Contracting powers.

The United States of America and the United States of Mexico being desirous to provide for the equitable distribution of the waters of the Rio Grande for irrigation purposes, and to remove all causes of controversy between them in respect thereto, and being moved by considerations of international comity, have resolved to conclude a Convention for these purposes and have named as their Plenipotentiaries:

Los Estados Unidos de América y los Estados Unidos Mexicanos deseosos de ponerse de acuerdo en la equitativa distribución de las aguas del Río Grande para fines de irrigación, y de alejar todas las causas de discusión entre ellos á ese respecto, y obrando por consideraciones de cortesía internacional, han resuelto celebrar una Convención con este propósito y han nombrado sus Plenipotenciarios, á saber:

Plenipotentiaries.

The President of the United States of America, Elihu Root, Secretary of State of the United States; and

El Presidente de los Estados Unidos de América, al Señor Elihu Root, Secretario de Estado de los Estados Unidos; y

The President of the United States of Mexico, His Excellency Señor Don Joaquín D. Casasús, Ambassador Extraordinary and Plenipotentiary of the United States of Mexico at Washington;

El Presidente de los Estados Unidos Mexicanos, á Su Excelencia el Señor Don Joaquín D. Casasús, Embajador Extraordinario y Plenipotenciario de los Estados Unidos Mexicanos en Washington;

Who, after having exhibited their respective full powers, which were found to be in good and due form, have agreed upon the following articles:

quienes, despues de presentar sus plenos poderes respectivos, que se encontraron en buena y debida forma, han convenido en los artículos siguientes:

ARTICLE I.

Amount of water delivered to Mexico annually.

After the completion of the proposed storage dam near Engle, New Mexico, and the distributing

ARTÍCULO I.

Una vez que se hayan terminado la proyectada presa cerca de Engle, Nuevo México, y el sistema auxi-

system auxiliary thereto, and as soon as water shall be available in said system for the purpose, the United States shall deliver to Mexico a total of 60,000 acre-feet of water annually, in the bed of the Rio Grande at the point where the head works of the Acequia Madre, known as the Old Mexican Canal, now exist above the city of Juarez, Mexico.

liar de distribución al efecto, y tan luego como haya agua disponible para el objeto en dicho sistema, los Estados Unidos entregarán á México un total de 60,000 acres pies de agua anualmente, en el lecho del Río Grande y en el punto en donde se encuentran ahora las obras principales de la Acequia Madre, conocida con el nombre de viejo canal mexicano, arriba de Ciudad Juarez, Mexico.

ARTICLE II.

ARTICULO II.

Distribution of water.

The delivery of the said amount of water shall be assured by the United States and shall be distributed through the year in the same proportions as the water supply proposed to be furnished from the said irrigation system to lands in the United States in the vicinity of El Paso, Texas, according to the following schedule, as nearly as may be possible:

Los Estados Unidos asegurarán la entrega de dicha cantidad de agua y la distribuirán durante el año en las mismas proporciones que la cantidad de agua que se proyecta proporcionar del expresado sistema de irrigación á los terrenos de los Estados Unidos en las cercanías de El Paso, Texas, de conformidad, y tan aproximadamente como sea posible, con la siguiente lista:

	Acre-feet per month.	Corresponding cubic feet of water.		Acres-pies por mes.	Pies cúbicos de agua correspondientes.
January	0	0	Enero	0	0
February	1,090	47,480,400	Febrero	1,090	47,480,400
March	5,460	237,837,600	Marzo	5,460	237,837,600
April	12,000	522,720,000	Abril	12,000	522,720,000
May	12,000	522,720,000	Mayo	12,000	522,720,000
June	12,000	522,720,000	Junio	12,000	522,720,000
July	8,180	356,320,800	Julio	8,180	356,320,800
August	4,370	190,357,200	Agosto	4,370	190,357,200
September	3,270	142,441,200	Setiembre	3,270	142,441,200
October	1,090	47,480,400	Octubre	1,090	47,480,400
November	540	23,522,400	Noviembre	540	23,522,400
December	0	0	Diciembre	0	0
Total for the year	60,000 acre-feet	2,613,600,000 cubic feet	Total en el año	60,000 acres pies	2,613,600,000 pies cúbicos

Reduction of amount during drought.

In case, however, of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States.

En caso, sin embargo, de extraordinaria sequía ó de serio accidente en el sistema de irrigación en los Estados Unidos, se disminuirá la cantidad de agua que deba entregarse al canal mexicano, en la misma proporción que la que se entregue á las tierras sujetas á dicho sistema de irrigación en los Estados Unidos.

ARTICLE III.

ARTÍCULO III.

Cost of storing, etc., paid by United States. 34 Stat., p. 1357.

The said delivery shall be made without cost to Mexico, and the United States agrees to pay the

La expresada entrega se hará sin gasto alguno para México, y los Estados Unidos convienen en pagar

whole cost of storing the said quantity of water to be delivered to Mexico, of conveying the same to the international line, of measuring the said water, and of delivering it in the river bed above the head of the Mexican Canal. It is understood that the United States assumes no obligation beyond the delivering of the water in the bed of the river above the head of the Mexican Canal.

el total costo del depósito de la mencionada cantidad de agua que debe darse á México, de la conducción de la misma hasta la línea internacional, de la medición de dicha agua y de su entrega en el lecho del río, arriba de la boca del Canal Mexicano. Queda entendido que los Estados Unidos no asumen otra obligación que la de entregar el agua en el lecho del río, arriba de la boca del Canal Mexicano.

ARTICLE IV.

The delivery of water as herein provided is not to be construed as a recognition by the United States of any claim on the part of Mexico to the said waters; and it is agreed that in consideration of such delivery of water, Mexico waives any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the present Mexican Canal and Fort Quitman, Texas, and also declares fully settled and disposed of, and hereby waives, all claims heretofore asserted or existing, or that may hereafter arise, or be asserted, against the United States on account of any damages alleged to have been sustained by the owners of land in Mexico, by reason of the diversion by citizens of the United States of waters of the Rio Grande.

ARTÍCULO IV.

Waiver of all claims by Mexico, etc.

La entrega del agua, como aquí se establece, no se considerará como un reconocimiento por los Estados Unidos de ningún derecho por parte de México á dichas aguas; y se conviene que, en consideración á dicho abastecimiento de agua, México retira cualquiera y todas las reclamaciones, sea cual fuere su objeto, á las aguas del Río Grande entre la boca del actual Canal Mexicano y Fort Quitman, Texas, y declara también completamente arregladas y extinguidas todas las reclamaciones hasta hoy presentadas, existentes ó que puedan después suscitarse ó presentarse contra los Estados Unidos á causa de cualesquiera daños que los propietarios de tierras en México aleguen haber sufrido con motivo de las desviación de aguas del Río Grande efectuada por ciudadanos de los Estados Unidos.

ARTICLE V.

Legal basis of Mexican claims not conceded.

The United States, in entering into this treaty, does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted or which may be hereafter asserted by reason of any losses incurred by the owners of land in Mexico due or alleged to be due to the diversion of the waters of the Rio Grande within the United States; nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty. The understanding of both parties is that the arrangement contemplated by this treaty extends only to the

ARTÍCULO V.

Los Estados Unidos, al celebrar este tratado, no otorgan con él, explícita ni implícitamente, ningún fundamento legal para reclamaciones que en lo futuro se aleguen, ó puedan alegarse, procedentes de cualesquiera pérdidas sufridas por los propietarios de tierras en México, ora se deba ó se alegue deberse, á la desviación de las aguas del Río Grande dentro de los Estados Unidos; ni convienen los Estados Unidos de ninguna manera en el establecimiento de ningún principio general ó precedente á causa de la celebración de este tratado. Quedan entendidas las dos Altas Partes

Portion of the Rio Grande affected.

90

"P-3" Fourth sheet.

portion of the Rio Grande which forms the international boundary, from the head of the Mexican Canal down to Fort Quitman, Texas, and in no other case.

Contratantes que el arreglo que se proyecta con este tratado sólo se extiende á la porción del Río Grande que forma el límite internacional, desde la boca del Canal Mexicano hasta Fort Quitman, Texas, y á ningún otro caso.

ARTICLE VI.

ARTÍCULO VI.

Exchange of ratifications.

The present Convention shall be ratified by both contracting parties in accordance with their constitutional procedure, and the ratifications shall be exchanged at Washington as soon as possible.

La presente Convención será ratificada por Ambas Partes Contratantes de acuerdo con las formalidades constitucionales de cada una de ellas, y se canjearán las ratificaciones en Wáshington tan luego como fuere posible.

In witness whereof, the respective Plenipotentiaries have signed the Convention both in the English and Spanish languages and have thereunto affixed their seals.

En fe de lo cual, los respectivos Plenipotenciarios han firmado la presente Convención, tanto en inglés como en castellano, y han puesto en ella sus sellos.

Signatures.

Done in duplicate at the City of Washington, this 21st day of May, one thousand nine hundred and six.

Hecho en dos originales en la Ciudad de Washington, el 21 de Mayo, de mil novecientos seis.

ELIHU ROOT [SEAL.]
JOAQUIN D CASASUS [SEAL.]

Exchange of ratifications.

And whereas the said Convention has been duly ratified on both parts, and the ratifications of the two governments were exchanged in the City of Washington, on the sixteenth day of January, one thousand nine hundred and seven;

Proclamation.

Now, therefore, be it known that I, Theodore Roosevelt, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington, this sixteenth day of January, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States of America the one hundred and thirty-first.

[SEAL.]

THEODORE ROOSEVELT

By the President:
ELIHU ROOT
Secretary of State.

CANALIZATION PROJECT LANDS, EL PASO COUNTY, TEXAS.

IBWC TRACT NO.	ACREAGE	PREVIOUS OWNER	BOOK DEEDS, EL PASO COUNTY, RECORDING DATA
415,Tr.4	15.79	E.P.Natl.Bank,Trustee	2/18/39, Vol648,P.97
422	14.35	" ": " " "	2/18/39, Vol.648,P.97
417,Tr.1	1.03	Payne & Taylor	6/12/39, Vol.651,P.270
421	.25	Alice M.Outlaw	7/18/38, Vol.639,P.34
422-1	12.79	Abby B.Stevens,et al	10/26/38, Vol.639, P.314
422-2	.06	" " " "	10/26/40, Vol.677, P.220
423	2.52	A.A.Calhoun	10/7/38, Vol.639, P.237
424	.12	J.L.Andreas	12/10/38, Vol.639, P.463
425	3.53	L.T.Stock	7/29/38, Vol.637, P.74
428	9.97	McFall, Kerby, et al	12/29/38, Vol.639, P. 569
429	8,61	E. Brandes	12/29/38, Vol.645, P.1
430	51.06	W.F.Duckett	5/8/38, Vol.632, P.410
431	11.01	N. Abraham	4/13/39, Vol.646, P. 304
432	1.15	" "	4/13/39, Vol.649, P.19
433	6.59	E.Gonzales, et al	5/20/39, Vol.651, P.112
433-1	1.40	" " "	5/20/39, Vol.651, P.112
434	1.59	E. M. Ford	2/1/39, Vol.648, P.92
437	14.49	W. E. Jackson	5/25/39, Vol.649, P.373
438	12.43	D.R.Singh,Ind.,etc.	8/29/39, Vol652, P.353
439	4.98	W.R.Lovelace	6/14/39, Vol.648, P.537
419	1.04	May M.Crawford,et al	U.S.Dis.Ct.,W.Dis.Tex. #17 Civ. Judg. D.T. 1/18/39 Ord.Poss.1/25/39 Final Judg. 7/11/40
427	9.77	Martin & Thomas,et al	U.S.Dis.Ct., W.Dis.Tex. #1892 Civ.,Judg.D.T.9/13/38, Ord. Poss.9/17/38, Fin.Judg.7/13/40
435	2.59	James Jabalie Rosendo Yanez,et al	U.S.Dis.Ct.,W.Dis.Tex. #23 Civ. Judg.D.T. 1/18/39, Fin. Judg.5/31/39
436	13.85	Ada Shannon, et al	U.S.Dis.Ct.,W.Dis.Tex. #1891 Civ.,Judg.D.T.9/13/38, Final Judg. 11/9/38
442	15.83	Lee R.McCoy, et al	U.S.Dis.Ct., W.Dis.Tex. #32 Civ., Judg.D.T.6/5/39, Ord. Poss.6/13/39, Fin. Judg. 10/23/40
443 445	11.00 28.30	C.R.Richards, et al	U.S.Dis.Ct., W.Dis.Tex. #41 Civ. Fin. Judg. 8/1/41

TRACT NO.	ACREAGE	PREVIOUS OWNER	RECORDING DATA
441	13.59	N.Abraham	5-5-39, Vol.649, P.230
441-1	.03	" "	11/26/40, Vol.677, P.224
444	7.05	R.J.Channell	4/7/39, Vol.645, P.593
446	17.43	" " "	4/7/39, Vol.647, P.306
446-1	17.09	Eda Kimbrough	3/17/39, Vol.648, P.204
447	.95	A.C.Powell	1/15/40, Vol.658, P.284
448	2.21	F.P.Burnett	3/27/40, Vol.663, P.42
449	7.81	Carl Fossen	8/8/39, Vol.650, P.590
450	.27	Wm.W.Deerman	12/21/38, Vol.639, P.568
451	.76	ElPaso Cotton Ind.Co.	2/11/39, Vol.645, P.314
452	17.70	D.Ram Singh, et al	8/22/39, Vol.651, P.564
453	11.80	E.K.Talbot	3/17/39, Vol.645, P. 422
455	7.38	Gillett Dairy Co.	3/22/39, Vol.645, P.460
457 } Comb. 463 }	16.87	Irrigated Farms Co.	3/30/39, Vol.648, P.304
458	.66	" " "	5/18/39, Vol.649, P.299
459	1.27	" " "	5/18/39, Vol.651, P.69
460	2.66	L.D.Snell	4/3/39, Vol.650, P.137
461	3.50	R. J. Channell	3/30/39 Vol.647, P.286
462	1.63	" " "	3/30/39, Vol.647, P.285
464	28.40	Hemley & Rishaberger	5/23/39, Vol.650, P.160
465	7.07	C.F.Hanson	3/30/39, Vol.647, P.288
466	3.21	Tri-State Assn. of Credit Men	3/23/39, Vol.648, P.237
466-1	.98	B.D.Luchini, et al	5/9/39, Vol.644, P.470
468	9.04	Lewis Rapp	4/6/39, Vol.650, P.138
469	.80	J.C.Rishaberger	2/1/39, Vol.648, P.88
470	5.26	Hemley & Rishaberger	5/5/39, Vol.649, P.282
471	4.62	Albert Morce	2/25/39, Vol.646, P.129
472	.77	F.Lowe, et al	5/10/39, Vol.646, P.493
473	4.65	Mamie E.Morce,et al	2/1/39, Vol.648, P.94
474	33.16	M.R.Hemley	5/6/39, Vol.651, P.66
454(Condem.)	51.93	Wm.Polkingham heirs, et al	U.S.Dis.Ct., W.Dis.Tex. #20 Civ., Judg.D.T.12/1/238, Cond. Ord.Poss.12/28/38.
467	47.07	L.J.Kohlberg,et al	U.S.Dis.Ct.,W.Dis.Tex. #46 Civ., Judg. D.T.8/31/39, Ord. Poss. 4/19/40.
474-1	.68	M.R.Hemley	5/17/39, Vol.644, P.520

(Second Page)

Name	Lots	Acres
Sherwood, H. J.		5
Sherwood, M. J.		5
Shiner, J. V.		12
Sillas, Guadalupe		26
Silvas, Maria		3
Silvernail, F. P.		23
Sims, J. B.	3	
Sing, Wong		15
Skov, W. P.		5
Skov, W. P.		164
Smith, J. J.		7
Smith, J. J.		120
Smith & Wingo		84
Solis, Daria Garcia de		¼
Soto, Ramon		1
Spalin, Damasio		6
Spence, Frank A.		125
Stahmann, W. J.		9
Stahmann, W. J.		26
Staten, Burleson		34
Steffen, Catherine W.		1
Stewart, L. J.		1.5
Stillwell, George		½
Swann, J. S.		10
Swann. J. S.		5
Talamantez, Jesus	1	
Tapia, Ermenez		1
Tapia, Martin		5
Tapia, Martin		3
Tarango, Marcos C.		9
Tarango, Ynocente		8
Tauton, A. W.		50
Telles, Cesario		14

Name	Lots	Acres
Telles, Felipe		10.5
Tellez, Tiburcio		17
Tellez, Victoriano		3
Thomas, H.		2.5
Thomson, L. R.		5
Thomson, L. R.		40
Thomson, L. R.		180
Thomson, L. R.		50
Thurston, W. A.	2	
Timenes, Ricardo		4
Tirres, Celzo		25
Tirres, Graciano		1
Tirres, Lucas		2.5
Tirres, Lucas		30
Tirres, Patricio		14.5
Tobin, Frank R.		10
Tobin, Frank R.		2
Torres, Eulogio		3
Torres, Juan		5
Traviso, Francisco		2
Trent, H. R.		55
Tubbs, Gilbert		2
Tuley, W. L.		2.5
Turner, S. T.		75
Turner, S. T.		40
Turner & Worsham		330
Turner & Worsham		34
Valdespino, A. S.		74
Valencia, Andres		5
Valencia, Isidiro		2.5
Valencia, Joaquin		5
Valenzuela, Francisco		½

Name	Lots	Acres
Varn, J. E. & G. W.		175
Vasquez, Bacilio		2.5
Vasquez, Francisco		90
Vasquez, Francisco		45
Veloz, Guadalupe		1.5
Vigil, Patricio		3
Vigil, Santiago		½
Villa, Miguel		¼
Villareal, Urbano		13
Vinyard, Anna		30
Wadlington, J. Y.		150
Wahl, Mrs. G. W.		1.5
Walter, Gustav		12
Want, L. B.		¼
Want, L. B.	3	1
Warden, J. W.	3	
Warnock, W. J.		2
Watkins, Mrs. W. E.		2.5
Weaver, A. H.		7
Webb, M. H.		110.5
Wells, Homer		33
Wetzig, E. L.		30
Wheeler. G. H.		20
Whitaker, J. A.		5
Whitaker, Lane		125
White, C. F.		10
White, C. F.		70
Whitney, T. W.		1
Williams, H. H.		15
Wingo, T. M.		60.
Womack, J. Y.		75
Word, T. H.		½

Name	Lots	Acres
Word, T. H.		8
Worsham, B. M.		60
Wright, J. M. B.		1
Wuerschmidt, Mrs. Anna		½
Yong, Park Sang		20
Young, C. C		5
Ysleta Improvement Co.		10
Ysleta Improvement Co.		10
Zimpelman, T. W.		21
Total acreage irrigated, 1913		11,454

No. 123.

Certified Water Appropriation filing Made by A. M. Loomis et al.

L. M. Lawson, Project Manager, El Paso, Texas.

Rec'd May 21, 1914 at 9 A.M.
(S.) W. T. PALLER,
Sec.

Filed June 10th, 1914. Recorded June 18th A.D. 1914 in Book 2, Pages 3-16, Water Appropriation Records.

Total fee $13.30.

Mr. Edwards:

We next offer in evidence an exhibit marked Plaintiff's Exhibit No. 5 (Reporter marks same "P-5"), which is an Order of the Commissioners' Court of El

Paso County, Texas, made on May 22, 1917 and is in Book 10, Page 566, of the Minutes of the Commissioners' Court, establishing the El Paso County Water Improvement District Number One by metes and bounds.

(Mr. Edwards shows same to opposing counsel.)

Mr. Grambling:
It is all right. We have no objection.

Plaintiff's Exhibit 5, having been received in evidence by the Court, reads and states in words and figures as follows:

"P-5".

Tuesday, May 22, 1917.

Court met at 11: o'clock A.M .

Officers present:

E. B. McClintock, County Judge;

R. E. Lyons, Commissioner, Precinct No. 1;

George Pendell, Commissioner, Precinct No. 2;

H. L. Lyons, Commissioner, Precinct No. 3;

W. D. Greet, Clerk.

In the Commissioners' Court, El Paso County, Tex.

In the matter of the Petition of C. N. Bassett and others, praying for the establishment of a Water Improvement District, as in said petition described, and designated as El Paso County Water Improvement District No. 1.

Commissioners' Court Minutes, Term May, 1917 Tuesday, the 22nd day of May, A.D. 1917.

Be it known: That an Election was called for that purpose in said District, and held on the 19th day of May, A.D. 1917, and two thirds and more of the resident property tax payers voting thereat voted in favor of the creation of said District.

Now, Therefore, it is ordered by the Court that said District be, and the same is hereby established, under the name of El Paso County Water Improvement District No. 1, with the following metes and bounds, to-wit:

(Description of property.)

Parcel No: 1. Mesilla Valley in Texas.

Beginning at a point on the thirty second (32 n) parallel of North latitude, where the middle line of the East half (E.½) of Section 35, T.26 S.R. 3 E.N.M.P.M., intersects said parallel; thence South of the middle line of the East half (E.½) of said Section 35, and of Section 2, 11 and 14, T.27 S.R. 3 E., approximately three and three eighths (3-3/8) miles to the South side of Section 14; thence West along said Section line to the East right of way line of the Rio

Grande, El Paso & Santa Fe Railroad; thence Southerly along said East right of way land two (2) miles to the South side of Section 26; thence East along said section line approximately Nine Hundred (900) feet to the Southeast corner of said Section; thence South along the East side of Section 35, T.27 S. R. 3 E. one (1) mile to the Southeast corner of said Section; thence East on the North line of Section 1, T.28 S.R. 3 E. one quarter (¼) mile; thence South on the middle line of the West half (W ½) of Sections 1 and 12, two (2) miles to the South line of Section 12; thence East on said South line one-quarter (¼) mile to the South quarter (S ¼) corner of said Section; thence South on the middle line of Section 13, approximately three quarter (3/4) mile to its intersection with the East right of way line of the Rio Grande, El Paso & Santa Fe Railroad; thence Southerly along said right of way line approximately one quarter (¼) mile to the North line of Section 24; thence Easterly on said North line, approximately three-thousand (3000) feet to the Northeast corner of said Section; thence South on the East line of Sections 24 and 25. T.28 S.R. 3 E. approximately one and three-eighths (1-3/8) miles to the intersection of said line with the East right of way line of the Rio Grande, El Paso & Santa Fe Railroad; thence along said East right of way line approximately three quarter (3/4) mile to the South line of Section 30, T.28 S.R. 4 E; thence East along said Section line, approximately half mile to the North and South middle line of the Northeast (N.E. ¼) quarter of Section 31; thence south on said middle line half (½) mile; thence East on the middle line of Section 31, one quarter (¼) mile to the East quarter (E. ¼) corner; thence South on the East line

of Section 31, one quarter (¼) mile; thence East on the middle line of the Southwest (S.W. ¼) of Section 32, one-quarter (¼) mile to the center of said quarter; thence South on middle line of Southwest (S.W. ¼) quarter of Section 32, T.28 S. R. 4 E, and the N. W. quarter (N.W.¼) of Section 5, T.29 S. R. 4 E, approximately 5000 feet to the intersection of said line with the East right of way line of the Rio Grande, El Paso & Santa Fe Railroad; thence along said East right of way line, approximately one mile to the intersection of said line with the Southeasterly line of the Pedro Perez Survey No. 157; thence Southwesterly along said Southeasterly line to its intersection with the boundary line between the States of Texas and New Mexico; thence along said boundary line in a general Northwesterly direction to its intersection with the thirty second (32d) parallel of North latitude: thence East along said thirty second (32d) parallel to the point of beginning.

Parcel No. 2. El Paso Valley.

Beginning at a point in the center of the Rio Grande, in Section Three (3), Township Thirty One (31) South, Range five (5) East, N.M.P.M. where the City limits of the City of El Paso, Texas intersects the international boundary line between the State of Texas and the Republic of Mexico; thence North along the line of the City limits on Boon Street to the intersection of said City limits of El Paso, Texas with the North right of way line of the Franklin Canal of the Rio Grande Project, opposite Station 278 plus 42.5; thence Easterly along said North right of way line of the said Franklin Canal approximately one thousand and

nine hundred (1900) feet to the East side of Section Three (3), Township Thirty One (31) South, Range Five (5) East, N.M.P.M.; thence North along the East side of said Section Three (3) and Section Thirty Four (34), Township Thirty (30) South Range Five (5) East, N.M.P.M., approximately two thousand two hundred (2200.o) feet to the North right of way line of the Galveston, Harrisburg & San Antonio Railroad; thence in an Easterly direction following said right of way line through Sections Thirty five (35) and Thirty Six (36), Township Thirty (30) South Range five (5) East, N.M.P.M., and Section One (1), Township Thirty-One (31) South Range Five (5) East, N.M.P.M., and Section Six (6) Township thirty one (31) South, Range Six (6) East, N.M.P.M., approximately two and one-fourth (2-¼) miles to the intersection of said right of way line and the center line of the El Paso County Road, known as the North Loop Road, in the Northwest quarter (N.W.¼) of said Section Six (6); thence in a Southeasterly direction following the center of said County Road through Sections Six and Five (6 & 5) a distance of approximately one (1) mile to a point on the East and West middle line of the Southwest quarter (S.W.¼) of Section Five (5); thence East on the said middle line, approximately two thousand five hundred (2500.o) feet; thence South on the middle line of Section Five (5) or e-fourth (¼) of a mile to the quarter corner on the South side of said Section; thence East along the North side of Section Eight (8) one-fourth (¼) of a mile; thence South along the middle line of the Northeast quarter (N.E.¼) of Section Eight (8) one-fourth (¼) of a mile to the center of said Northeast quarter (N.E ¼); thence E. along the middle line

of said Northeast quarter (N.E.¼), one-fourth (¼) of a mile to the East side of said Section; thence South along the East side of Section Eight (8) one-fourth (¼) of a mile to the quarter corner on the East side of said Section; thence East along the middle line of Section Nine (9) one-half of a mile (½), to the center of said Section; thence South along the middle line of said Section one-fourth (¼) of a mile; thence East along the middle line of the Southeast quarter (S.E. ¼) of Section nine (9) and the Southwest quarter (S.W. ¼) of Section Ten (10), three-fourths (3/4) of a mile to the center of the Southwest quarter (SW ¼) of Section Ten (10); thence South along the middle lin e ofsaid Southwest quarter (S.W.¼) one-fourth (¼) of a mile to the South side of said Section; thence East along the North side of Section fifteen (15), one-fourth (¼) of a mile to the quarter corner on the North side of Section fifteen (15); thence South on the middle line of Section fifteen (15) one-half (½) of a mile to the center of said Section; thence East along the middle line of Sections fifteen (15) and fourteen (14), three-fourths (3/4) of a mile; thence South along the middle line of the Southwest quarter of Section fourteen (14) one-fourth (¼) of a mile to the center of said Southwest quarter (S.W. ¼); thence East along the middle line of said Southwest quarter (S.W.¼) one-fourth (¼) of a mile; thence South along the middle line of Sections fourteen (14) and twenty-three (23), one-half (½) of a mile; thence East along the middle line of the Northeast quarter (N.E. ¼) of Section twenty-three (23) one-half (½) of a mile to the East side of said Section; thence South along the East side of Section twenty-three (23) one-fourth (¼) of a mile to the

quarter corner on the East side of Said Section; thence East along the middle line of Section Twenty-fourth (24) one-fourth (¼) of a mile; thence South along the middle line of the Southwest quarter (S.W.¼) of Section Twenty-four (24) one-fourth (¼) of a mile to the center of said Southwest quarter (S.W.¼); thence East along the middle line of said Southwest quarter (S.W. ¼) one-fourth (¼) of a mile; thence South along the middle line of Section Twenty-four (24) one-fourth (¼) of a mile to the quarter corner on the South side of said Section; thence East along the North side of Section Twenty-five (25) one-half (½) of a mile to the Northeast corner (N.E.) of said Section; thence South along the East side of Section twenty-five (25) T. thirty-one (31) S.R. 6 E. one-fourth (¼) of a mile; thence East along the middle line of the Northwest quarter (N.W.¼) of Section thirty (30) T. thirty-one (31) S. R. 7 E. one-fourth (¼) of a mile to the center of said Northwest quarter (N.W. ¼); thence South along the middle line of said Northwest quarter (N.W. ¼); one-fourth of a mile; thence East along the middle line of Section thirty (30) one-fourth (¼) of a mile to the center of said Section; thence South along the middle line of Section Thirty (30) one-fourth (¼) of a mile; thence East along the middle line of the Southeast quarter (S.E.¼) of Section Thirty (30) one-fourth (¼) of a mile to the center of said Southeast quarter (S.E.¼); thence South along the middle line of the Southeast quarter (S.E.¼) of Section Thirty (30) and the Northeast quarter (N.E.¼) of Section Thirty-one (31) one-half (½) of a mile to the center of the Northeast quarter N.E. ¼) of Section Thirty-One (31); thence East along the middle line of said Northeast quarter

(N.E. ¼) one-fourth (¼) of a mile to the East side of said Section; thence South along the East side of Section Thirty-One (31) one-fourth (¼) of a mile to the quarter corner on the East side of said Section; thence East along the middle line of Section thirty-two (32) one-fourth (¼) of a mile; thence South along the middle line of the Southwest quarter (S.W.¼) of Section thirty-two (32) one-fourth (¼) of a mile to the center of said Southwest quarter (S.W.¼); thence East along the middle line of the South half (S.½) of Section thirty-two (32) one-half (½) of a mile to the center of the Southeast quarter (S.E. ¼) of said Section; thence South along the middle line of said Southeast quarter (S.E.¼), one-fourth (¼) of a mile to the South side of said Section; thence East along the South side of Section Thirty-two (32), Township Thirty-One (31) South Range 7 E. N.M.P.M., one-fourth (¼) of a mile to the Southeast corner of said Section; thence S. along the East side of Section Five (5), Township thirty-two (32) South, Range 7 East, N.M.P.M., one-fourth (¼) of a mile; thence along the middle line of the Northwest quarter (N.W. ¼) of Section four (4) one-fourth (¼) of a mile to the center of said Northwest quarter (N.W. ¼); thence South along the middle line of the Northwest quarter (N.W. ¼), one-fourth (¼) of a mile; thence East along the middle line of Section Four (4) one-fourth (¼) of a mile to the center of said Section; thence South along the middle line of Section Four (4) one-half (½) of a mile to the quarter corner on the South side of said Section; thence East along the North side of Section Nine (9), one-fourth (¼) of a mile; thence South along the middle line of the Northeast quarter (N.E. ¼) of Section Nine (9), one-fourth (¼) of a mile to the center of said Northeast quarter (N.E.

¼); thence East along the middle line of said Northeast quarter (N.E.¼), one-fourth (¼) of a mile to the East side of said Section; thence South along the East side of Section Nine (9) one-half (½) of a mile; thence East along the middle line of the Southwest quarter (S.W.¼) of Section Ten (10), one-fourth (¼) of a mile to the center of said Southwest quarter (S.W.¼); thence South along the middle line of said Southwest quarter (S.W.¼), one-fourth (¼) of a mile to the South side of said Section; thence East along the North side of Section fifteen (15) one-fourth (¼) of a mile to the quarter corner on the North side of said Section; thence South along the middle line of Section fifteen (15), one-half (½) of a mile to the center of said Section; thence East along the middle line of Section fifteen (15), one-fourth (¼) of a mile; thence South along the middle line of the Southeast quarter (S.E.¼) of Section fifteen (15), one-fourth (¼) of a mile to the center of said Southeast quarter (S.E.¼); thence East along the mildle line of said Southeast quarter (S.E.¼), one-fourth (¼) of a mile to the East side of said Section; thence South along the East side of Sections fifteen (15) and twenty-two (22), one-half (½) of a mile; thence East along the middle line of the Northwest quarter (N.W.¼) of Section twenty-three (23) one-fourth (¼) of a mile to the center of said Northwest quarter (N.W.¼); thence South along the middle line of the West half (W. ½) of Section twenty-three (23) one-half of a mile; thence East along the middle line of the Southwest quarter (S.W.¼) of Section twenty-three (23), one-fourth (¼) of a mile; thence South along the middle line of Section twenty-three (23), one-fourth (¼) of a mile to the quarter corner on the South side of said Section;

thence East along the North side of Section Twenty-six (26), one-fourth (¼) of a mile; thence South along the middle line of the Northeast quarter (N.E.¼) of Section twenty-six (26), one-half (½) of a mile; thence East along the middle line of Section twenty-six (26), one-fourth (¼) of a mile to the quarter corner on the East side of said Section; thence South along the East side of Section twenty-six (26), one-fourth (¼) of a mile; thence East along the middle line of the Southwest quarter (S.W.¼) of Section Twenty-five (25) one-fourth (¼) of a mile to the center of said Southwest quarter (S.W.¼); thence South along the middle line of the West half (½) of Sections twenty-five (25) and thirty-six (36) three-fourths (3/4) of a mile; thence East along the middle line of Section Thirty-six (36), one-fourth (¼) of a mile to the center of said Section; thence South along the middle line of Section thirty-six (36), Township thirty-two (32) South, Range 7 E. N.M.P.M. and Section One (1), Township thirty-three (33) South, Range 7 E. N.M.P.M. three-fourths (3/4) of a mile; thence East along the middle line of the Northeast quarter (N.E.¼) of Section One (1) one-fourth (¼) of a mile to the center of said Northeast quarter (N.E.¼); thence South along the middle line of said Northeast quarter (N.E.¼) one-fourth (¼) of a mile; thence East along the middle line of Section One (1), Township thirty-three (33) South, Range 7 E. N.M.P.M. and Section Six (6) Township Thirty-three (33) South, Range 8 E. N.M.P.M., one-half (½) of a mile; thence South along the middle line of the Southwest quarter (S.W.¼) of Section Six (6) one-half (½) of a mile to the South side of said Section; thence East along the North side of Section Seven (7), one-fourth

of a mile to the quarter corner on the North side of said Section; thence South along the middle line of Section Seven (7), three-fourths (3/4) of a mile; thence East along the middle line of the Southeast quarter (S.E.¼) of Section (7) Seven, one-fourth (¼) of a mile to the center of said Southeast quarter; thence South along the middle line of the Southeast quarter (S.E.¼) of Section Seven (7) and the Northeast quarter (N.E.¼) of Section Eighteen (18), one-half (½) of a mile to the center of the Northeast quarter (N.E.¼) of Section Eighteen (18); thence East along the middle line of said Northeast quarter (N.E.¼), one-fourth (¼) of a mile to the East side of said Section; thence South along the East side of Section Eighteen (18), one-half (½) of a mile; thence East along the middle line of the Southwest quarter (S.W.¼) of Section Seventeen (17), one-fourth (¼) of a mile to the center of said Southwest quarter (S.W.¼); thence South along the middle line of said Southwest quarter (S.W.¼), one-fourth of a mile (¼) to the South side of said Section; thence East along the North side of Section Twenty (20), one-half (½) of a mile; thence South along the middle line of the East half of Section twenty (20), three-fourths (3/4) of a mile to the center of the Southeast quarter (S.E.¼) of said Section; thence East along the middle line of said Southeast quarter (S.E.¼) of Section Twenty (20) and the Southwest quarter (S.W.¼) of Section Twenty-One (21), one-half (½) of a mile to the center of the Southwest quarter (S.W.¼) of Section Twenty One (21); thence South along the middle line of the Southwest quarter (S.W.¼) of Section twenty-one (21) and the Northwest quarter (N.W.¼) of Section Twenty-Eight (28) one-half (½) of a mile

to the center of the Northwest quarter (N.W.¼) of Section Twenty-Eight (28); thence East along the middle line of the Northwest quarter (N.W.¼) of Section Twenty Eight (28), one-fourth (¼) of a mile; thence South along the middle line of Section Twenty eight (28) one-half of a mile (½); thence East along the middle line of the Southeast quarter (S.E.¼) of Section Twenty-Eight (28), one-fourth (¼) of a mile to the center of said Southeast quarter (S.E.¼); thence South along the middle line of the Southeast quarter (S.E.¼) of Section Twenty Eight (28), and the Northeast quarter (N.E. ¼) of Section Thirty three (33), three-fourths (3/4) of a mile; thence West along the middle line of Section Thirty-three (33) one-fourth (¼) of a mile to the center of said Section; thence South along the middle line of Section Thirty-three (33), Township thirty-three (33) South, Range 8E., NMPM, and Section Four (4), Township Thirty-four (34) South, Range 8 E., N.M.P.M., one (1) mile to the center of Section Four (4); thence East along the middle line of Section Four (4) one-fourth (¼) of a mile; thence South along the middle line of the Southeast quarter (S.E.¼) of Section Four (4), one-fourth (¼) of a mile to the center of said Southeast quarter (S.E.¼); thence East along the middle line of said Southeast quarter (S.E.¼) one-fourth (¼) of a mile to the East side of said Section; thence South along the East side of said Section four (4) approximately one-half (½) mile to the center of the Rio Grande; thence in a Southeasterly direction following the center of the Rio Grande through Sections Ten (10), Fifteen (15), Fourteen (14), Twenty-three (23), Twenty-Six (26), Twenty-Seven (27) and thirtyfive (35), a distance of approximately Seven (7) miles to

the intersection of the center of the Rio Grande with the International boundary line between the State of Texas and the Republic of Mexico, being a point approximately in the center of Section Thirty-five (35), Township thirty-four (34) South, Range 8 East, N.M. P.M., thence following said International boundary line in a general Northwesterly direction a distance of approximately fifty (50) miles to the point of beginning.

May 22, 1917.

On motion of Commissioner Herring seconded by Commissioner Pendell, it is ordered that the expenses of the election be paid.

The Court then adjourned Sine Die.

Attest:

W. D. GREET,
County Clerk,
By CHRIS ARANDA, JR.,
Deputy.
(S.) E. B. McCLINTOCK,
County Judge.

The State of Texas,
County of El Paso.

I, Raymond L. Telles, Jr., County Clerk, and Ex-Officio Clerk of the Commissioners' Court of El Paso County, Texas, do hereby certify that the foregoing is a true and correct copy of the Commissioners' Court Order re: El Paso County Establishing El Paso County Water Improvement District #1, as the same

appears of record in the Commissioners' Court Minutes of said County in Volume 10, Page 566, et seq.

Given Under My Hand and Seal of Office, at office, in El Paso, Texas, this the 9th day of December, A.D. 1952.

RAYMOND L. TELLES, JR.,
County Clerk, and Ex-Officio
Clerk of the Commissioners'
Court of El Paso County,
Texas,
By (S.) MARGARET BUEHLER.
(Seal) Deputy.

(At this time an instrument was marked for identification as Plaintiff's Exhibit 6 and was handed to opposing counsel for examination.)

Mr. Edwards:

We next offer a document which is marked "Plaintiff's Exhibit No. 6" and which is the Order of the Commissioners' Court of El Paso County, Texas, made on February 10, 1919, of record in Book 11, Page 310, of the minutes of the Court, establishing the El Paso County Conservation and Reclamation District No. 2 by metes and bounds.

Plaintiff's Exhibit 6, having been received in evidence by the Court, reads in words and figures as follows:

"P-6".

The State of Texas,
County of El Paso.

Be It Remembered, that at a regular session of the Commissioners Court, of El Paso County Texas, held at the Court house in El Paso, the County seat of said County, on February 10, 1919, the following members of said Court, were present.

E. B. McClintock, County Judge.

R. E. Lyons, Commissioner Precinct No. 1.

George Pendell, Commissioner Precinct No. 2;

Henry L. Herring, Commissioner Precinct No. 3;

J. F. Williams, Commissioner Precinct No 4.

Also W. D. Greet, Clerk of the county Court, of El Paso County, Texas, and ex officio Clerk of the Commissioners' Court of said county.

Thereupon, there came on to be considered the matter of the petition of Chas. A. King, Thos. N. Williams, and others, praying for the establishment of a conservation and Reclamation district in said county as in said petition described and designated as El Paso County Conservation and reclamation District No. two.

Be It Known, that an election was called for that purpose in said district and held on the 5th day of February A.D. 1919, and two-thirds of the resident

property tax payers voting thereat voted in favor of the creation of said district;.

Now therefore it is ordered by the Court, that said district be and the same is hereby established under the name of "El Paso County Conservation and Reclamation District Number Two" with the following metes and bounds, to wit:

Beginning at the intersection of the west boundary of section three (3), Township thirty four (34) south, Range eight (8) East., of the N.M.O.M., of the Survey by the U. S. Reclamation service, and the center of the Rio Grande thence north along said west line of section three (3) one-quarter (¼) mile; thence easterly along the quarter line in the southwest quarter (SW¼) of said section three (3) One-quarter (¼) mile, thence southerly along the quarter quarter line in southwest quarter (SW¼) of said section three (3) one quarter (¼) mile to the south boundary of said section three (3) thence easterly along said boundary three quarters (3 4) mile to the corner of sections two (2) three (3) ten (10) and eleven (11), township thirty four (34) South, Range eight (8) east thence easterly along the north boundary of section eleven (11) T. thirty four (34) south, range eight (8) East one-quarter (¼) mile; thence coutherly along quarter, quarter line in northwest quarter (NW¼) of section eleven (11) one-half (½) mile; thence easterly along the mid section line of said section eleven (11) one-quarter (¼) mile to center of section eleven (11) thence southerly along mid section line one-half (½) mile, to the south boundary of said section eleven (11) thence easterly one-half (½) Mile, along said south boundary of section eleven (11) to the corner

of sections eleven (11), twelve (12) thirteen (13) and fourteen (14); thence southerly along the west boundary of section thirteen (13) township thirty-four (34) South, range eight (8) east one-quarter (¼) mile, thence easterly along the quarter quarter line in northwest quarter (NW¼) of said section thirteen (13) one-quarter (¼) mile, thence southerly along the quarter quarter line in west one-half (W½) of section thirteen (13) one-half (½) mile, thence easterly along quarter quarter line in southwest quarter (SW¼) of said section thirteen (13) one-quarter (¼) mile, thence southerly along the mid section line of said section thirteen (13) one-quarter (¼) mile, to the south boundary of said section thirteen (13) thence easterly along said south boundary one-half (½) mile to the corner of sections thirteen (13) and twenty-four (24), township thirty-four (34) south, range eight (8) east and sections eighteen (18) and nineteen (19) Township thirty-four (34) south, range nine (9) east, thence southerly along the west boundary of section nineteen (19) Township thirty-four (34) south, Range nine (9) east, threequarters (3/4) mile; thence Easterly along the quarter quarter line in southwest quarter (SW¼) of said section nineteen (19) one-half (½) mile; thence southerly along the mid section line of said section nineteen (19) one-quarter (¼) mile, to the south boundary of said section nineteen (19); thence easterly along said south boundary one-quarter (¼) mile; thence southerly along the quarter quarter line in the northeast quarter (NE¼) of section thirty (30) Township thirty four (34) south, Range nine (9) East one-quarter (¼) mile, thence easterly along the quarter quarter line in said northeast quarter (NE¼) of section thirty (30) one quar-

ter (¼) mile to the east boundary of said section thirty (30); thence southerly along the east boundary of said section thirty (30) One quarter (¼) mile, thence easterly along the mid section line of section twenty-nine (29) township thirty-four (34) south, Range nine (9) east one-quarter (¼) mile; thence southerly along the quarter quarter line of southwest quarter (SW¼) of section twenty nine (29) One-quarter (¼) mile, thence easterly along quarter quarter line of southwest quarter (SW¼) of said section twenty nine (29) one quarter mile (¼) thence southerly along the mid section line of said section twenty nine (29) one-quarter (¼) mile, to the south boundary of said section twenty nine (29), thence easterly along the said south boundary of section twenty-nine (29) one-half (½) mile to the corner of sections twenty-eight (28) twenty nine (29) thirty two (32) and thirty three (33) Township thirty four (34) south, range nine (9) east, thence southerly along the west boundary of section thirty-three (33) Township thirty four (32) south, Range nine (9) east one-quarter (¼) mile thence easterly along the quarter quarter line in northwest quarter (NW¼) of said section thirty-three (33) One-half (½) Mile, thence southerly along mid section line of section thirty-three (33) one-quarter (¼) Mile to the center of said section thirty three (33) thence easterly along the mid section line of said section thirty three (33) One-quarter (¼) mile, thence southerly along the quarter quarter line in southeast quarter (SE¼) of said section thirty-three (33) One-half (½) Mile, to the south boundary of said section thirty-three (33) Thence easterly along said south boundary of section thirty-three (33) one-quarter (¼) Mile to the corner of Sections Thirty-three (33) and thirty-four (34) Township thirty four (34) South, range nine

(9) east, and sections three (3) and four (4) Township thirty five (35) South range nine (9) east, thence easterly along the north boundary of section three (3) Township thirty-five (35) south, Range nine (9) east one-half (½) Mile thence southerly along the mid section line of said section three (3) One-quarter (¼) mile, thence easterly along the quarter quarter line in northeast quarter (NE¼) of said section three (3) one-quarter (¼) mile thence southerly along the quarter quarter line in northeast quarter (NE¼) of said section three (3) one-quarter (¼) Mile thence easterly along the mid section line of said section three (3) one-quarter (¼) Mile to the east boundary of said section three (3); thence southerly along the east boundary of said section three (3) one-quarter (¼) mile, thence easterly along the quarter quarter line in southwest quarter (SW¼) of section two (2) Township thirty five (35) South, range nine (9) east one-quarter (¼) Mile, thence southerly along the quarter quarter line in southwest quarter (SW¼) of said section Two (2) One-quarter (¼), Mile, to the north boundary of section eleven (11) township thirty five (35) south, Range nine (9) east; thence easterly along said north boundary of section eleven (11) one-half (½) Mile; thence southerly along quarter quarter line on northeast quarter (NE¼) of said section eleven (11) one-quarter (¼) mile, thence easterly along quarter quarter line in northeast quarter (NE¼) of said section eleven (11) one-quarter (¼) Mile to the east boundary of said section eleven (11) thence easterly along quarter quarter line in northwest quarter (NW¼) of section twelve (12) one-quarter (¼) mile; thence southerly along quarter quarter line in west one-half (W½) of said section twelve (12) to the intersection of said north and south quarter

quarter line in west one-half (W½) of section twelve (12) with the Rio Grande, thence along center of Rio Grande to point of beginning, said tract being situated in El Paso County, State of Texas.

The Court then adjourned sine die.

(S.) E. B. McCLINTOCK
County Judge

Attest:

W. D. GREET,
County Clerk,
By (S.) L. W. AMADOR,
Deputy.

The State of Texas,
County of El Paso.

I, Raymond L. Telles, Jr., County Clerk in and for El Paso County, State of Texas, and Ex-Officio Clerk of the Commissioners' Court of El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the Commissioners' Court Order re: the organization of the El Paso County Conservation and Reclamation District #2, as the same appears of record in the Commissioners' Court Minutes of said County in Volume 11, Page 310, et seq.,

Given Under My Hand and Seal of Office, at office, in El Paso, Texas, this the 9th day of December, A. D. 1952.

RAYMOND L. TELLES, JR.,
County Clerk and Ex-Officio
Clerk of the Commissioners'
Court of El Paso County,
Texas.

By (S.) MARGARET BUEHLER,
Deputy.

(Seal)

The Court:

Let me inquire there so I may better understand these exhibits as we go along. What became of this District?

Mr. Edwards:

I am going to show you that right now.

The Court:

All right.

Mr. Edwards:

We next offer Plaintiff's Exhibit No. 7 (Reporter marks same "P-7"), which is a certified copy of the minutes of both the El Paso County Water Improvement District No. 1 and the El Paso County Water Conservation District No. 2, whereby the two districts were consolidated as of the date of October 1, 1920. (Shows same to opposing counsel.)

Mr. Sims:

We haven't seen those before, Mr. Edwards. If it is simply a consolidation of the two districts, we wouldn't want to hold up the Court at this time, but if there is anything extraneous we would like to have a chance to object.

Mr. Edwards:

No.

Plaintiff's Exhibit 7, having been received in evidence by the Court, reads in words and figures as follows:

"P-7"

El Paso County Water Improvement District No. 1.

Minutes of a Special meeting of the Board of Directors, held in the General Office of the District at El Paso, Texas. Meeting called to order at 3 P.M., August 27. 1920.

Directors Present: T. D. Porcher (Presiding), Idus T. Gillett, J. J. Perez, W. J. Stahmann.

Directors Absent: J. J Smith.

Visitors: N. Van Gass, C. A. Mebus, J. Van Every, A. R. Burges. M W Stanton. P W. Dent.

Business Transacted. Resolutions Adopted. Etc:

After calling the meeting to order discussion centered on the subject of consolidating El Paso County Conservation and Reclamation District No 2 with El Paso County Water Improvement District No. 1.

On motion of Mr. Porcher seconded by Mr. Stahmann the following resolution was adopted:

Be It Resolved by the Board of Directors of El Paso County Water Improvement District No. 1. that such district be consolidated with the El Paso County Conservation and Reclamation District No. 2. upon the terms and conditions set forth in written contract. substantially in words and figures as follows. to-wit:

The State of Texas,
County of El Paso.

This Memorandum of Agreement made by and between El Paso County Water Improvement District No. 1, acting by and through its Board of Directors, and the El Paso County Conservation and Reclamation District No. 2, acting by and through its Board of Directors.

Witnesseth:

First: That the said parties to this contract hereby convenant and agree, each with the other, that the aforesaid El Paso County Water Improvement District No. 1, and the El Paso County Conservation and Reclamation District No. 2 shall be consolidated into one district, pursuant to Section 121, Chapter 28, Acts of 36th Legislature, Second Called Session, approved July 25, A.D. 1919, and shown in Session Laws, Pages 65 and 76 thereof and the provisions thereof are hereby invoked and adopted. Said District No. 1 hereinbefore referred to is fully described and the boundaries thereof designated and shown in the office of the County Clerk of El Paso County, Texas, in Vol 10, Pages 567 to 574, of the Minutes of the Commissioners' Court thereof, and a full and complete description of the boundaries of said District No. 2 is shown in Vol. 11, Pages 270 to 276, of the Minutes of the Commissioners' Court of El Paso County Texas, to which said records reference is hereby made for a particular description of the boundaries of said two districts, and the combined area of the aforesaid two districts shall constitute all of the land included in the district as consolidated.

Second: That the name of said District, when so consolidated, shall be the El Paso County Water Improvement District No. 1, that is to say, the name of one of the Districts entering into this contract.

Third: That the said parties further convenant and agree, each with the other, that the aforesaid lands in said District No. 2 shall, by and with the consent of the Secretary of the Interior, be received into what is known as the Rio Grande Project upon the same terms and conditions as lands originally included within the Project, as heretofore defined and established by Acts of Congress and the United States Reclamation Service.

Fourth: That it is further agreed by the parties hereto that the lands incorporated in said District No. 2 and now brought under the Project, shall, according to the area thereof and the benefits received, assume its pro rata part of the indebtedness to the United States Reclamation Service as heretofore incurred, upon Elephant Butte Reservoir, all diversion dams, and Main Irrigation Canals as shown by expenditures heretofore made and hereafter to be made by the United States Reclamation Service, in like manner as such expenditures have heretofore been and now are prorated among existing districts under the Rio Grande Project.

Fifth: It is further agreed that the indebtedness of the two districts as they heretofore existed, other than that to the United States Reclamation Service, shall be borne, assumed and paid by the District incurring the same, and the officers of the consolidated District shall have the right to levy and collect assessments for the purpose of paying such indebtedness.

Sixth: It is hereby agreed by and between the parties to these present that to consummate and put into effect the terms of this agreement, there shall be held within the territorial boundaries of the respective districts an election to determine whether or no said districts shall be consolidated, said election to be held at each voting precinct within the respective districts pursuant to the terms of the statute.

Seventh: It is further agreed by and between the parties to this consolidation agreement that the Board of Directors of said El Paso County Water Improvement District No. 1, shall be and constitute the Board of Directors, and shall have full power and authority to act as the Board of Directors for the District as consolidated, from and after the expiration of the ninety (90) days provided for in the statutes, until the next general election for Directors, and the said members of the Board of Directors shall comply with the terms of the statute in order to qualify themselves to act as such Board of Directors.

Eighth: It is further agreed and understood that all irrigation canals owned by private individuals within the territorial limits of District No. 2, and which shall be acceptable to the United States Reclamation Service, shall be acquired by such Reclamation Service and the value thereof credited on account to the owners of such canals as against the construction cost of the Rio Grande Project, which value shall be agreed upon with such owners. Provided however, that if the Reclamation Service shall elect not to take over such canals, then the value thereof shall be determined in the manner provided by law for the acquisition of such canals, or such value may

be collected by special assessments on the lands incorporated in, and now a part of District No. 2, making use thereof.

Witness the hands of the parties hereto in duplicate, this 27th day of August, A. D. 1920.

(Signed) T. D. PORCHER,
W. J. STAHMANN,
IDUS T. GILLETT,
JOSE J. PEREZ,
N. VAN GASS,
JUD. VAN EVERY,
C. A. MEBUS,
W. J. STAHMANN.

After reaching agreement with the officials of the Tornillo District who were present it was decided to hold an election on September 25th for the purpose of determining whether or not the El Paso County Water Improvement District No. 1 shall consolidate with the El Paso County Conservation and Reclamation District No. 2, and the following resolution pertaining to this action was adopted on motion of Mr. Gillett seconded by Mr. Perez:

Be It Resolved By the Board of Directors that there be held within El Paso County Water Improvement District No. 1 an election to determine whether or not said District shall be consolidated with the El Paso County Conservation and Reclamation District No. 2 said election to be held at each voting precinct within the territorial limits of the District, on the 25th day of September, A. D. 1920.

First: It is therefore ordered by this Board of Directors of El Paso County Water Improvement Dis-

trict No. 1, that an election shall be held within said Water Improvement District, on Saturday September 25, 1920, within the hours prescribed by law, for the purpose of determining whether or not said El Paso County Water Improvement District No. 1 shall consolidate with El Paso County Conservation and Reclamation District No. 2, as provided by law.

Second: It is further ordered that notice of such election shall be given in the mode and manner, and for the length of time required by law, stating the time and places of holding such election, and the question to be voted upon, which notices shall be posted at four public places in said District, and one notice thereof posted at the Court House door of El Paso County, Texas, all for twenty days previous to the date of such election, and notice thereof given by publishing the same once each week for three consecutive weeks in some newspaper published in El Paso County, Texas.

At said election there shall be printed on the ballot the words:

"For consolidation".

"Against consolidation".

Third: It is further ordered that said election shall be held at the following places, hereinafter named, one such polling place being here named for each voting precinct or part of voting precinct embraced within said District, and the following judges and clerks are hereby named, authorized and directed to hold said election at the respective polling places herein named, to-wit:

In Precinct No. 42, to be held at Ramon Gomez' Store, W. J. Warnock, Presiding Judge, A. S. Thurmond, Associate Judge and F. D. Hadlock and R. W. Page, Clerks.

In Precinct No. 43, to be held at Joe Marestein's Store on the County Road, at San Jose; A. J. Frazar, Presiding Judge; Catarino Serna, Associate Judge; and Geo. Huffman and M. L. Cadwallader, Clerks.

In Precinct No. 44, to be held at Ysleta School House, F. G. Candelaria, Presiding Judge; Joe Lowenstein, Associate Judge; and James Buchanan and Albert V. Gonzales, Clerks.

In Precinct No. 45, to be held at Socorro School House, Andres Hernandez, Presiding Judge, Francisco Sierra, Associate Judge, and D. Baca and Andres Chavez, Clerks.

In Precinct No. 46, to be held at San Elizario School House, Lauriano Garcia, Presiding Judge, Juan Alarcon, Associate Judge, and J. G. N. Garcia and Max Aranda, Clerks.

In Precinct No. 47, to be held at Clint School House, G. N. Garcia, Presiding Judge, J. J. Schairer, Associate Judge, and Jos. Silva and Pat Dolan, Clerks.

In Precinct No. 49, to be held at Fabens School House, Luciano Lopez, Presiding Judge, Leonardo Lujan, Associate Judge and Eugenio Perez and Herminio Ruiz, Clerks.

In Precinct No. 48, to be held at the Island School House, J. M. Escajeda, Presiding Judge, Pedro Garcia, Associate Judge, and Severo Cordero and Braulio Chavez, Clerks.

In Precinct No. 52, to be held at Canutillo School House, R. Noel Longuemare, Presiding Judge, J. D. Porcher, Associate Judge, and C. A. Kinkel and Sam B. Gillett, Clerks.

Fourth: It is further ordered that the Secretary of the Board shall provide all necessary ballots for said election which shall in no event be less than one and one-half times as many ballots as there are qualified resident tax-paying voters, within said District, as shown by the tax rolls of El Paso County, Texas, and said ballots shall have printed thereon the following:

"For consolidation."

"Against consolidation."

There being no further business the meeting adjourned.

(S.) T. D. PORCHER,
(S.) IDUS T. GILLETT,
(Seal) Secretary.

El Paso County Water Improvement District No. 1

Minutes of a Special Meeting of the Board of Directors, held in the General Office of the District at El Paso, Texas.

Meeting called to order at 10 A.M., October 1, 1920.

Directors Present: T. D. Porcher (Presiding), Idus T. Gillett, W. J. Stahmann, J. J. Perez.

Directors Absent: J. J. Smith.
Visitors: Maj. R. F. Burges, Atty. A. R. Burges, Capt. N. Van Gass and C. A. Mebus.

Business Transacted, Resolutions Adopted, Etc.:

Special Meeting of the Board of Directors of the El Paso County Water Improvement District No. 1, held to canvass the returns of an election held within and for said District on the 25th day of September, A. D. 1920, pursuant to the order of the Board made and entered on the 27th day of August, A. D. 1920, for the purpose of determining whether or not El Paso County Water Improvement District No. 1 shall be consolidated with the El Paso County Conservation and Reclamation District No. 2, upon the terms and conditions set forth in written contract between the consolidating parties as entered on the minutes of the Board of Directors of El Paso County Water Improvement District No. 1 under date of August 27th.

On motion by Mr. Gillett, seconded by Mr. Perez the following action with reference to the canvass was taken:

Be It Remembered: That on this 1st day of October, A. D. 1920, the Board of Directors of the El Paso County Water Improvement District No. 1 being in session, and there being present T. D. Porcher, Presi-

dent, Idus T. Gillett, Secretary, W. J. Stahmann and J. J. Perez, Members of the Board, there came for consideration the canvassing of the returns and declaring the results of said election held within and for said El Paso County Water Improvement District No. 1, on the 25th day of September, A. D. 1920, for the purpose aforesaid.

And it appearing to the said Board of Directors that due notice of said election was given in the manner and form and for the engtth of time required by law, and the returns thereof have been duly and legally made, and at said election the following vote was cast:

Number of Election	Precinct		Total Votes
42	Valverde	5	
43	San Jose	3	108
44	Ysleta	26	
45	Socorro	11	
46	San Eliz.	14	
47	Clint	19	
49	Fabens	10	
48	Island	7	
52	Canutillo	13	

And it further appearing to the Board that at said election there were cast in favor of the proposition for consolidation of El Paso County Water Improvement District No. 1 with the El Paso County Conservation and Reclamation District No. 2, 103 votes, and against consolidation of El Paso County Water Improvement District No. 1 with the El Paso County Conservation and Reclamation District No. 2, 5 votes,

the affirmative of said proposition did receive more than a majority of all votes cast at said election.

It is therefore found and declared by the Board that the consolidation of El Paso County Water Improvement District No. 1 with El Paso County Conservation and Reclamation District No. 2 has been authorized and carried, and that this Board is authorized to execute and put into effect the terms of the agreement heretofore referred to.

And this Board does hereby declare the affirmative of the proposition submitted at said election, to have received the vote necessary to put the same into effect, and the same is hereby declared carried.

A. Detailed statement of the expense for the month of September was reported by Mr. Harwell as a total of $1,076.25. After discussion of the individual items, as submitted, and on motion by Mr. Stahmann seconded by Mr. Perez, the account was accepted and approved.

A report was then made of the financial conditions of the District on October 1st, 1920 with comments as to collection and other features, the report was adopted as read.

Consideration was given the letter from L. M. Lawson, Project Manager, on the subject of the winter run of water. The following dates were accepted by the organization as approved, on motion of Mr. Stahmann seconded by Mr. Gillett:

October 15, 1920—Gates closed at Elephant Butte Dam.

November 1, 1920—Gates opened at Elephant Butte Dam.

November 15, 1920—Gates closed at Elephant Butte Dam.

December 1, 1920—Gates opened at Elephant Butte Dam.

December 15, 1920—Close of 1920 Irrigation Season.

February 1 to 15, 1921—1921 Irrigation Season opens.

By unanimous consent the meeting was adjourned for the purpose of holding a joint meeting with the Directors of the El Paso County Conservation and Reclamation District No. 2.

(S.) T. D. PORCHER,
President.

(S.) IDUS T. GILLETT,
Secretary.

El Paso County Water Improvement District No. 1.

Minutes of a Joint Special Meeting of the Board of Directors, held in the General Office of the District at El Paso, Texas.

Meeting called to order at 11:50 A.M., October 1, 1920.

Directors Present: T. D. Porcher (Presiding), Idus T. Gillett, W. J. Stahmann, J. J. Perez, C. A. Mebus, N. Van Gass.

Directors Absent: J. J. Smith, J. Van Every, S. G. Schairer.

(Mr. Stahmann acting as Director of both the El Paso County Water Improvement District No. 1 and El Paso County & Conservation District No. 2.)

Visitors: A. R. Burges.

Business Transacted, Resolutions Adopted, Etc.:

On calling the meeting to order there was presented by Mr. Stahmann the following records of the meeting of the Directors of El Paso County Conservation and Reclamation District No. 2 held for the purpose of canvassing the returns of an election held September 25th, 1920:

"El Paso County Conservation and Reclamation District No. 2.

Minutes of a special meeting of the Board of Directors held in the general offices of the said District at Tornillo, Texas, for the purpose of canvassing the election returns of an election held on Saturday, the 25th day of September, 1920, for the purpose of determining whether or not the El Paso County Water Improvement District No. 1 should be consolidated with the El Paso County Conservation and Reclamation District No. 2.

The meeting was called to order at 9:30 A.M. September 30th, 1920.

Directors present were: W. J. Stahmann, Director Presiding, Capt. N. Van Gass, Director; C. A. Mebus, Director.

Absent: S. G. Schairer.

After the meeting was called to order, the President announced that the object of the meeting was for the purpose of canvassing the returns as before stated when the following proceedings were had:

Order canvassing return of election and declaring result thereof.

State of Texas,
County of El Paso.

On this 30th day of September, 1920, the Board of Directors of the El Paso County Conservation and Reclamation District No. 2, being in session, there came for consideration the canvassing of returns and declaring the result of an election held in the said District No. 2 on the 25th day of September, 1920, for the purpose of determining at such election whether or not the necessary majority of the qualified voters of said District No. 2 who were property tax payers in said District, voting at said election, favored the consolidation of the El Paso County Water Improvement District No. 1 with the said El Paso County Conservation and Reclamation District No. 2, pursuant to the contract heretofore made and entered into between the Board of Directors of said Districts and dated the 27th day of August, 1920, and it appearing to said Board of Directors of said District No. 2 that said election was duly called and due notice thereof given in both the newspaper and by posting notices as the law directs, due proof of which has been returned before the Board of Directors, and it further appearing to said Board of Directors of said District No. 2 that said election was in all

respects legally held and that the returns thereof had been duly and legally made, and delivered to the Secretary of said Board, who in turn delivered same to said Board, and that at said election held as aforesaid, the following legal votes were cast, to-wit:

At election Precinct No. 49, known as Fabens Precinct, there were cast in favor of consolida on three votes and against said consolidation none votes.

In Precinct No. 50, known as Tornillo Precinct there were cast eleven votes for consolidation and against said consolidation one vote.

And it appearing to said Board of Directors that there were fourteen votes cast for the consolidation of said Districts numbered one (1) and two (2) in El Paso County, and that there were one votes cast against the consolidation of said Districts before named, and it further appearing to the said Board of Directors that the election was duly held as aforesaid and that the returns were legally made, pursuant to the Statute of Texas:

It Is, Therefore, Ordered and Adjudged By said Board of Directors, in meeting duly assembled as aforesaid, that the necessary majority, as above appears, of the qualified voters, voting at said election, for the consolidation of said Districts were cast, and, therefore, determined that said contract entered into as aforesaid by and between the said Boards of Directors and said District should be i:. all things carried out, and it is in all things so ordered and adjudged by said Board of Directors.

It is also ordered by said Board of Directors, in meeting duly assembled, that the President and Secretary of said Board of Directors, together with the other members thereof, make due report of the foregoing proceedings to the Directors of El Paso County Irrigation District No. 1 in all things as the law requires.

(Signed) C. A. MEBUS,
Secretary Pro Tem.
(Signed) W. J. STAHMANN,
President.

Following the presentation of the above matter the joint Board, on the motion of Mr. Stahmann seconded by Mr. Mebus adopted a consolidation resolution as follows:

Whereas it appears from the minutes of the meetings of the Boards of Directors of El Paso County Water Improvement District No. 1 and El Paso County Conservation and Reclamation District No. 2 that at an election held within said Districts on the 25th day of September, A. D. 1920 that the proposition to consolidate said two Districts has been carried, and

Whereas it appears to this meeting of the joint Boards of said two Districts that said election was in fact carried by a majority vote of the electors within said Districts, and said fact has been duly certified by the Boards of Directors of the respective Districts to this joint meeting of said two Boards.

Therefore Be It Resolved: By the joint meeting of the Boards of Directors of said El Paso County Water Improvement District No. 1 and El Paso County Con-

servation and Reclamation District No. 2 that the said two Districts be and they are hereby declared consolidated under the name of El Paso County Water Improvement District No. 1, in accordance with the law governing such action and the written contract of said two Districts made and entered of record in the minutes of said respective Districts.

El Paso County Conservation and Reclamation District No. 2.

Minutes of a Special Meeting of the Board of Directors held in the General Office of the District At Tornillo, Texas.

Meeting called to order at 2:30 P.M., August 28, 1920.

Directors Present: W. J. Stahmann (Presiding), Jud Van Every, Capt. N. Van Gass, C. A. Mebus, S. G. Schairer.

Directors Absent: None.

Visitors:

Business transacted, resolutions adopted, etc: The following order and resolution was read and presented to the Board of Directors for its consideration:

Be it Resolved by the Board of Directors of El Paso County Conservation and Reclamation District No. 2, that such District be consolidated with the El Paso County Water Improvement District No. 1, upon the terms and conditions set forth in that certain

written contract made and entered into by the respective Boards of Directors of said Districts, and which written contract is substantially in words and figures as follows, to-wit:

The State of Texas,
County of El Paso.

This Memorandum of Agreement made by and between El Paso County Water Improvement District No. 1, acting by and through its Board of Directors, and the El Paso County Conservation and Reclamation District No. 2, acting by and through its Board of Directors,

Witnesseth:

First: That the said parties to this contract hereby covenant and agree, each with the other, that the aforesaid El Paso County Water Improvement District No. 1, and the El Paso County Conservation and Reclamation District No. 2 shall be consolidated into one District pursuant to Section 121, Chapter 28, Acts of 36th Legislature, Second Called Session, approved July 25, A. D. 1919, and shown in Session Laws, Pages 65 to 76 thereof and the provisions thereof are hereby invoked and adopted. Said District No. 1 hereinbefore referred to is fully described and the boundaries thereof designated and shown in the office of the County Clerk of El Paso County, Texas, in Vol. 10, Pages 567 to 574, of the Minutes of the Commissioners Court thereof, and a full and complete description of the boundaries of said District No. 2 is shown in Vol. 11, Pages 270 to 276, of the Minutes of the Commissioners Court of El Paso County, Texas, to which said records reference is hereby made for a partic-

ular description of the boundaries of said two Districts, and the combined area of the aforesaid two Districts shall constitute all of the land included in the District as consolidated.

Second: That the name of said District, when so consolidated, shall be the El Paso County Water Improvement District No. 1, that is to say, the name of one of the Districts entering into this contract.

Third: That the said parties further covenant and agree, each with the other, that the aforesaid lands in said District No. 2 shall, by and with the consent of the Secretary of the Interior, be received into what is known as the Rio Grande Project upon the same terms and conditions as lands originally included within the Project, as heretofore defined and established by Acts of Congress and the United States Reclamation Service.

Fourth: That it is further agreed by the parties hereto that the lands incorporated in said District No. 2 and now brought under the Project, shall, according to the area thereof and the benefits received, assume its pro rata part of the indebtedness to the United States Reclamation Service as heretofore incurred upon Elephant Butte Reservoir, all Diversion Dams and Main Irrigation Canals as shown by expenditures heretofore made and hereafter to be made by the United States Reclamation Service, in like manner as such expenditures have heretofore been and now are pro rated among existing districts under the Rio Grande Projects.

Fifth: It is further agreed that the indebtedness of the two Districts as they heretofore existed, other than that to the United States Reclamation Service, shall be borne, assumed and paid by the District incurring the same, and the officers of the consolidated district shall have the right to levy and collect assessments for the purpose of paying such indebtedness.

Sixth: It is hereby agreed by and between the parties to these presents that to consummate and put into effect the terms of this agreement, there shall be held within the territorial boundaries of the respective districts an election to determine whether or no said Districts shall be consolidated, said election to be held at each voting precinct within the respective Districts pursuant to the terms of the Statute.

Seventh: It is f rther agreed by and between the parties to this consolidated agreement that the Board of Directors of said El Paso County Water Improvement District No. 1, shall be and constitute the Board of Directors, and shall have full power and authority to act as the Board of Directors for the District as consolidated, from and after the expiration of the ninety (90) days provided for in the statutes, until the next general election for Directors, and the said members of the Board of Directors shall comply with the terms of the statute in order to qualify themselves to act as such Board of Directors.

Eight: It is further agreed and understood that all irrigation canals owned by private individuals within the territorial limits of the District No. 2, and which shall be acceptable to the United States Reclamation

Service, shall be acquired by such Reclamation Service and the value thereof credited on account to the owners of such canals as against the construction cost of the Rio Grande Project, which value shall be agreed upon with such owners. Provided however, that if the Reclamation Service shall elect not to take over such canals, but the same are thereafter used, hen the value thereof shall be determined in the manner provided by law for the acquisition of such canals, and such value may be collected by special assessments on the lands incorporated in, and now a part of District No. 2, making use thereof.

Witness The Hands of the Parties hereto in duplicate, this 27th day of August, A. D. 1920.

T. D. PORCHER,
W. J. STAHMANN,
IDUS T. GILLETT,
JOSE J. PEREZ,
Board of Directors of Said
District No. One (1).
N. VAN GASS,
JUD VAN EVERY,
C. A. MEBUS,
W. J. STAHMANN,
Board of Directors of said
District No. Two (2).

Thereupon Director J. Van Every moved that the foregoing resolution, incorporating the written contract, hereinbefore set forth, be adopted, and which motion received a second by Director N. Van Gass, and after due consideration and discussion of said resolution, a vote was duly taken thereon, which resulted as follows: Directors J. Van Every, Capt. N.

Van Gass, S. G. Schairer, W. J. Stahmann and C. A. Mebus voted in favor of the adoption of said resolution, and no votes were registered against same. Thereupon the President of the Board of Directors announced that said motion to adopt said resolution had been unanimously carried, and said resolution was in all things adopted, and it was so ordered.

The President then announced that the next business before the Board of Directors, would be to make and enter the proper resolutions and orders providing for an election to be held in said District No. 2, pursuant to the contract and resolution, this day adopted, providing for the consolidation of El Paso County Water Improvement District No. 1, with the El Paso County Conservation and Reclamation District No. 2, and thereupon the following resolution and order was duly presented to the Board of Directors at said meeting, providing for the said election as hereinafter set forth, for consideration by said Board of Directors, to-wit:

First. It is therefore ordered, and by the Board of Directors and at said meeting duly resolved that an election shall be held within the boundaries of the said El Paso County Conservation and Reclamation District No. 2, on the 25th day of September, A. D. 1920, within the hours prescribed by law for holding election, and which election shall be held in each and every Precinct, within the territorial limits of said District No. 2, and at said election there shall be submitted and printed on the official ballots the words "For Consolidation", "Against Consolidation".

Second. It is by the Board of Directors, further ordered and resolved, that notice of such election shall be given, in the mode and manner and for the length of time required by law, stating the time and places of holding said election, and the said question or proposition to be voted upon, and which notice shall be posted in four public places within the limits of the said El Paso County Conservation and Reclamation District No. 2, and one of such notices shall be posted at the Court House door of El Paso County Texas, and all of the said notices shall be posted for twenty (20) days, previous to the said date and day of election, and which said notice shall also be published in the newspaper in El Paso County, Texas, in the mode and manner provided by law for three consecutive weeks or more, prior to said date of election, and which said notice shall in all things comply with the provisions of the Statutes of the State of Texas, as to contents and publication thereof.

Third. It is also further, by the Board of Directors, ordered and resolved that said election shall be held on the date aforesaid at the following places being here named and designated, for each voting precinct or part of such voting precinct embraced and located in said District, and the following Judges and Clerks are hereby named, and authorized, empowered and designated, to hold the said election at the respective polling places herein named, to-wit:

(A) The said election in Precinct No. 49, known as the Fabens Precinct to be held at the residence of Elam Bros., in said District and Jud Van Every shall act as Presiding Judge, and Robert Elam as Associ-

ate Judge, and Henry Elam shall act as Clerk, at said polling place, and in said Precinct.

(B) The said election in Precinct No. 50, being what is known as the Tornillo Precinct to be held at store of W. J. Ayers, and W. J. Ayers is designated as Presiding Judge, and W. T. Young as Associate Judge in said Precinct, and A. J. Peterson and A. Bramwell Clerks thereof.

Fourth. It is by the said Board of Directors further ordered and resolved, that the Secretary of the said Board of Directors and the said District, shall provide all necessary ballots to be used by the qualified voters at said election and which said ballots so provided shall in no event be less than one and one-half times as many ballots as there are qualified residents and tax paying voters in the said District, as shown by the tax polls of El Paso County, Texas, and as shown by the tax rolls of said District, and the said official ballot shall have printed thereon,

"For Consolidation",

"Against Consolidation",

and which said ballot shall in all respects conform to the provisions of the statutes of the State of Texas.

Thereupon Director J. Van Every moved the adoption of the foregoing order and resolution, and said motion was duly seconded by N. Van Gass, Director and after discussion, the motion was put to a vote which resulted as follows:

In favor of the adoption of the said resolution, W. J. Stahmann, J. Van Every, Capt. N. Van Gass, S. G. Schairer, C. A. Mebus.

Against the adoption of said resolution: None.

Thereupon the President of the Board of Directors declared that the motion to adopt said resolution had been unanimously carried and that said resolution had been duly adopted.

Thereupon motion was made, seconded and carried, that the meeting adjourn.

(S.) C. A. MEBUS,
Secretary.

El Paso County Conservation and Reclamation District No. 2.

Minutes of a Special Meeting of the Board of Directors held in the General Office of the District at Tornillo, Texas for the purpose of canvassing the election returns of an election held on Saturday, the 25th day of September, 1920, for the purpose of determining whether or not the El Paso County Conservation and Reclamation District No. 2 should be consolidated with the El Paso Water Improvement District No. 1.

Meeting called to order at 9:30 A. M., September 30, 1920.

Directors Present: W. J. Stahmann, Director (Presiding), Capt. N. Van Gass Director, C. A. Mebus, Director.

Directors Absent: S. G. Schairer, Director.

Visitors:

Business Transacted Resolutions Adopted, Etc.:

After the meeting was called to order, the President announced that the object of the meeting was for the purpose of canvassing the returns as before stated when the following proceedings were had:

Order canvassing return of election and declaring result thereof.

State of Texas,
County of El Paso.

On this 30th day of September, 1920, the Board of Directors of the El Paso County Conservation and Reclamation District No. 2, being in session, there came on for consideration the canvassing of returns and declaring the result of an election held in the said District No. 2 on the 25th day of September, 1920, for the purpose of determining at such election whether or not the necessary majority of the qualified voters of said District No. 2 who were property tax payers in said District, voting at said election, favored the consolidation of the El Paso County Conservation and Reclamation District No. 2 with the El Paso Water Improvement District No. 1, pursuant to the contract heretofore made and entered into between the Boards of Directors of said Districts and dated the 27th day of August, 1920, and, it appearing to said Board of Directors of said District No. 2 that

said election was duly called, and due notice thereof given in both the newspaper and by posting notices as the law directs, due proof of which has been returned before the Board of Directors, and it further appearing to said Board of Directors of said District No. 2 that said election was in all respects legally held and that the returns thereof had been duly and legally made, and delivered to the Secretary of said Board, who in turn delivered same to said Board, and that at said election held as aforesaid, the following legal votes were cast, to-wit:

In Election Precinct No. 49, known as the Fabens Precinct, there were cast in favor of consolidation three (3) votes, and against said consolidation no votes.

In Election Precinct No. 50, known as the Tornillo Precinct, there were cast eleven (11) votes for consolidation, and against said consolidation one (1) vote.

And it appearing to said Board of Directors that there were fourteen (14) votes cast for the consolidation of said Districts, numbered One (1) and Two (2) in El Paso County, and that there was one (1) vote cast against the consolidation of said Districts before named, and it further appearing to the said Board of Directors that the election was duly held as aforesaid and that the returns were legally made, pursuant to the Statutes of Texas:

It Is, Therefore, Ordered and Adjudged By Said Board of Directors, in meeting duly assembled as aforesaid, that the necessary majority, as above ap-

pears, of the qualified voters, voting at said election for the consolidation of said Districts were cast and, therefore, determined that said contract entered into as aforesaid by and between the said Boards of Directors and said District should be in all things carried out, and it is in all things so ordered and adjudged by said Board of Directors.

It is also ordered by said Board of Directors, in meeting duly assembled, that the President and Secretary of said Board of Directors, together with the other members thereof, make due report of the foregoing proceedings to the Directors of the E Paso County Water Improvement District No. 1 in all things, as the law requires.

There being no further business before the Board of Directors, upon motion duly made, seconded and carried said meeting of said Board of Directors adjourned, to meet in El Paso at the Office of the El Paso County Water Improvement District No. 1, at 10 A.M., October 1, 1920.

.....

President,

(S.) C. A. MEBUS.

Secretary Pro Tem.

Mr. Edwards:

We next will offer in evidence pamphlet marked "Plaintiff's Exhibit No. 8" (Reporter marks same), which is in pamphlet form for convenience being the Rio Grande Compact of March 18, 1938. Of course the Court can take judicial notice of it, the Act of the Texas Legislature of 1938, 46th Legislature, Special Act, and it appears in the Revised Civil Statutes.

Article 7466(e)(1), approved by the United States May 31, 1939 in 53 Statutes at Large, 785, Chapter 155, Laws of Colorado 1939, Chapter 146, Laws of New Mexico 1939, Chapter 33, Page 59; and it also appears in the Federal Reclamation Laws, Annotated, at Page 574; but for convenience of the Court we are offering it in pamphlet form.

Plaintiff's Exhibit 8, having been received in evidence by the Court, reads in words and figures as follows:

"P-8".

The Rio Grande Compact Entered into by the respective Commissioners for the States of Colorado, New Mexico and Texas on March 18, 1938.

Rio Grande Compact.

The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective Commissioners:

For the State of Colorado—M. C. Hinderlider.

For the State of New Mexico—Thomas M. McClure.

For the State of Texas—Frank B. Clayton.

who, after negotiations participated in by S. O. Harper appointed by the President as the representative of the United States of America, have agreed upon the following articles, to wit:

Article I.

(a) The State of Colorado, the State of New Mexico, the State of Texas, and the United States of America, are hereinafter designated "Colorado," "New Mexico," "Texas," and the "United States," respectively.

(b) "The Commission" means the agency created by this Compact for the administration thereof.

(c) The term "Rio Grande Basin" means all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman, including the Closed Basin in Colorado.

(d) The "Closed Basin" means that part of the Rio Grande Basin in Colorado where the streams drain into the San Luis Lakes and adjacent territory and do not normally contribute to the flow of the Rio Grande.

(e) The term "tributary" means any stream which naturally contributes to the flow of the Rio Grande.

(f) "Transmountain Diversion" is water imported into the drainage basin of the Rio Grande from any stream system outside of the Rio Grande Basin exclusive of the Closed Basin.

(g) "Annual Debits" are the amounts by which actual deliveries in any calendar year fall below scheduled deliveries.

(h) "Annual Credits" are the amounts by which actual deliveries in any calendar year exceed scheduled deliveries.

(i) "Accrued Debits" are the amounts by which the sum of all annual debits exceeds the sum of all annual credits over any common period of time.

(j) "Accrued Credits" are the amounts by which the sum of all annual credits exceeds the sum of all annual debits over any common period of time.

(k) "Project Storage" is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of 2,638,860 acre feet.

(l) "Usable Water" is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.

(m) "Credit Water" is that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both.

(n) "Unfilled Capacity" is the difference between the total physical capacity of project storage and the amount of usable water then in storage.

(o) "Actual Release" is the amount of usable water released in any calendar year from the lowest reservoir comprising project storage.

(p) "Actual spill" is al water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.

(q) "Hypothetical Spill" is the time in any year at which usable water would have spilled from project storage if 790,000 acre feet had been released therefrom at rates proportional to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs; in computing hypothetical spill the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following the effective date of this Compact and thereafter the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following each actual spill.

Article II.

The Commission shall cause to be maintained and operated a stream gaging station equipped with an automatic water stage recorder at each of the following points, to-wit:

(a) On the Rio Grande near Del Norte above the principal points of diversion to the San Luis Valley;

(b) On the Conejos River near Mogote;

(c) On the Los Pinos River near Ortiz;

(d) On the San Antonio River at Ortiz;

(e) On the Conejos River at its mouths near Los Sauces;

(f) On the Rio Grande near Labatos;

(g) On the Rio Chama below El Vado Reservoir;

(h) On the Rio Grande at Otowi Bridge near San Ildefonso;

(i) On the Rio Grande near San Acacia;

(j) On the Rio Grande at San Marcial;

(k) On the Rio Grande below Elephant Butte Reservoir;

(l) On the Rio Grande below Caballo Reservoir

Similar gaging stations shall be maintained and operated below any other reservoir constructed after 1929, and at such other points as may be necessary for the securing of records required for the carrying out of the Compact; and automatic water stage recorders shall be maintained and operated on each of the reservoirs mentioned, and on all others constructed after 1929.

Such gaging stations shall be equipped, maintained and operated by the Commission directly or in cooperation with an appropriate Federal or State agency, and the equipment method and frequency of measurement at such stations shall be such as to produce reliable records at all times.

Article III.

The obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line, measured at or near Lobatos, in each calendar year, shall be ten thousand acre feet less than the sum of those quantities set forth in the two following tabulations of relationship, which correspond to the quantities at the upper index stations:

Discharge of Conejos River

Quantities in thousands of acre feet

Conejos Index Supply (1)	Conejos River at Mouths (2)
100	0
150	20
200	45
250	75
300	109
350	147
400	188
450	232
500	278
550	326
600	376
650	426
700	376

Intermediate quantities shall be computed by proportional parts.

(1) Conejos Index Supply is the natural flow of Conejos River at the U. S. G. S. gaging station near Mogote during the calendar year plus the natural flow of Los Pinos River at the U. S. G. S. gaging station near Ortiz and the natural flow of San Antonio River at the U. S. G. S. gaging station at Ortiz both during the months of April to October, inclusive.

(2) Conejos River at Mouths is the combined discharge of branches of this river at the U. S. G. S. gaging stations near Los Sauces during the Calendar year.

Discharge of Rio Grande Exclusive of Conejos River

Quantities in thousands of acre feet

Rio Grande at Del Norte (3)	Rio Grande at Lobatos less Conejos at Mouths (4)
200	60
250	65
300	75
350	86
400	98
450	112
500	127
550	144
600	162
650	182
700	204
750	229
800	257
850	292
900	335
950	380
1000	430
1100	540
1200	640
1300	740
1400	840

Intermediate quantities shall be computed by proportional parts.

(3) Rio Grande at Del Norte is the recorded flow of the Rio Grande at the U. S. G. S. gaging station near Del Norte during the calendar year (measured

above all principal points of diversion to San Luis Valley) corrected for the operation of reservoirs constructed after 1937.

(4) Rio Grande at Lobatos less Conejos at Mouths is the total flow of the Rio Grande at the U.S.G.S. gaging stations near Lobatos less the discharge of Conejos River at its Mouths, during the Calendar year.

The application of those schedules shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) any new or increased depletion of the runoff above inflow index gaging stations; and (c) any transmountain diversions into the drainage basin of the Rio Grande above Lobatos.

In event any works are constructed after 1937 for the purpose of delivering water into the Rio Grande from the Closed Basin, Colorado shall not be credited with the amount of such water delivered unless the proportion of sodium ions shall be less than forty-five percent of the total positive ions in that water when the total dissolved solids in such water exceeds three hundred fifty parts per million.

Article IV.

The obligation of New Mexico to deliver water in the Rio Grande at San Marcial, during each calendar year, exclusive of the months of July, August and September, shall be that quantity set forth in the following tabulation of relationship, which corresponds to the quantity at the upper index station:

Discharge of Rio Grande at Otowi Bridge and at San Marcial Exclusive of July, August and September.

Quantities in Thousands of Acre Feet

Otowi Index Supply (5)	San Marcial Index Supply (6)
100	0
200	65
300	141
400	219
500	300
600	383
700	469
800	557
900	648
1000	742
1100	839
1200	939
1300	1042
1400	1148
1500	1257
1600	1370
1700	1489
1800	1608
1900	1730
2000	1856
2100	1985
2200	2117
2300	2253

Intermediate quantities shall be computed by proportional parts.

(5) The Otowi Index Supply is the recorded flow of the Rio Grande at the U.S.G.S. gaging station at

Otowi Bridge near San Ildefonso (formerly station near Buckman) during the calendar year, exclusive of the flow during the months of July, August and September, corrected for the operation of reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and Otowi Bridge.

(6) San Marcial Index Supply is the recorded flow of the Rio Grande at the gaging station at San Marcial during the calendar year exclusive of the flow during the months of July, August and September.

The application of this schedule shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) depletion after 1929 in New Meixco at any time of the year of the natural runoff at Otowi Bridge; (c) depletion of the runoff during July, August and September of tributaries between Otowi Bridge and San Marcial, by works constructed after 1937; and (d) any transmountain diversions into the Rio Grande between Lobatos and San Marcial.

Concurrent records shall be kept of the flow of the Rio Grande at San Marcial near San Acacia and of the release from Elephant Butte Reservoir, to the end that the records at these three stations may be correlated.

Article V.

If at any time it should be the unanimous finding and determination of the Commission that because of changed physical conditions, or for any other reason,

reliable records are not obtainable or cannot be obtained, at any of the stream gaging stations herein referred to, such stations may, with the unanimous approval of the Commission, be abandoned, and with such approval another station, or other stations, shall be established and new measurements shall be substituted which, in the unanimous opinion of the Commission, will result in substantially the same results, so far as the rights and obligations to deliver water are concerned, as would have existed if such substitution of stations and measurements had not been so made.

Article VI.

Commencing with the year following the effective date of this Compact, all credits and debits of Colorado and New Mexico shall be computed for each calendar year; provided, that in a year of actual spill no annual credits nor annual debits shall be computed for that year.

In the case of Colorado, no annual debit nor accrued debit shall exceed 100,000 acre feet, except as either or both may be caused by holdover storage of water in reservoirs constructed after 1937 in the drainage basin of the Rio Grande above Lobatos. Within the physical limitations of storage capacity in such reservoirs, Colorado shall retain water in storage at all times to the extent of its accrued debit.

In the case of New Mexico, the accrued debit shall not exceed 200,000 acre feet at any time except as such debit may be caused by holdover storage of

water in reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Labatos and San Marcial. Within the physical limitations of storage capacity in such reservoirs, New Mexico shall retain water in storage at all times to the extent of its accrued debit. In computing the magnitude of accrued debits or credits New Mexico shall not be charged with any greater debit in any one year than the sum of 150,000 acre feet and all gains in the quantity of water in storage in such year.

The Commission by unanimous action may authorize the release rom storage of any amount of water which is then being held in storage by reason of accrued debits of Colorado or New Mexico; provided, that such water shall be replaced at the first opportunity thereafter.

In computing the amount of accrued credits and accrued debits of Colorado or New Mexico, any annual credits in excess of 150,000 acre feet shall be taken as equal to that amount.

In any year in which actual spill occurs, the accrued credits of Colorado, or New Mexico, or both, at the beginning of the year shall be reduced in proportion to their respective credits by the amount of such actual spill; provided, that the amount of actual spill shall be deemed to be increased by the aggregate gain in the amount of water in storage, prior to the time of spill, in reservoirs above San Marcial constructed after 1929; provided, further, that if the Commissioners for the States having accrued credits authorize the release of part or all of such credits in advance of spill, the amount so released shall be deemed to constitute actual spill.

In any year in which there is actual spill of usable water, or at the time of hypothetical spill thereof, all accrued debits of Colorado, or New Mexico, or both, at the beginning of the year shall be canceled.

In any year in which the aggregate of accrued debits of Colorado and New Mexico exceeds the minimum unfilled capacity of project storage, such debits shall be reduced proportionaly to an aggregate amount equal to such minimum unfilled capacity.

To the extent that accrued credits are impounded in reservoirs between San Marcial and Courchesne, and to the extent that accrued debits are impounded in reservoirs above San Marcial, such credits and debits shall be reduced annual to compensate for evaporation losses in the proportion that such credits or debits bore to the total amount of water in such reservoirs during the year.

Article VII.

Neither Colorado nor New Mexico shall increase the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of usable water in project storage; provided, that if the actual releases of usable water from the beginning of the calendar year following the effective date of this Compact, or from the beginning of the calendar year following actual spill, have aggregated more than an average of 790,000 acre feet per annum, the time at which such minimum stage is reached shall be adjusted to compensate for the difference between the total actual release and re-

leases at such average rate; provided, further, that Colorado or New Mexico, or both, may relinquish accrued credits at any time, and Texas may accept such relinquished water, and in such event the state, or states, so relinquishing shall be entitled to store water in the amount of the water so relinquished.

Article VIII.

During the month of January of any year the Commissioner for Texas may demand of Colorado and New Mexico, and the Commissioner for New Mexico may demand of Colorado, the release of water from storage reservoirs constructed after 1929 to the amount of the accrued debits of Colorado and New Mexico, respectively, and such releases shall be made by each at the greatest rate practicable under the conditions then prevailing, and in proportion to the total debit of each, and in amounts, limited by their accrued debits, sufficient to bring the quantity of usable water in project storage to 600,000 acre feet by March first and to maintain this quantity in storage until April thirtieth, to the end that a normal release of 790,000 acre feet may be made from project storage in that year.

Article IX.

Colorado agrees with New Mexico that in event the United States or the State of New Mexico decides to construct the necessary works for diverting the waters of the San Juan River, or any of its tributaries, into the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of waters from the San Juan River, or the tributaries

thereof, into the Rio Grande in New Mexico, provided the present and prospective uses of water in Colorado by other diversions from the San Juan River, or its tributaries, are protected.

Article X.

In the event water from another drainage basin shall be imported into the Rio Grande Basin by the United States or Colorado or New Mexico, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefor in the application of the schedules.

Article XI.

New Mexico and Texas agree that upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be inerpreed to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another. Nothing herein shall be construed as an admission by any signatory state that the use of water for irrigation causes increase of salinity for which the user is responsible in law.

Article XII.

To administer the provisions of this Compact there shall be constituted a Commission composed of one

representative from each state, to be known as the Rio Grande Compact Commission. The State Engineer of Colorado shall be ex-officio the Rio Grande Compact Commissioner for Colorado. The State Engineer of New Mexico shall be ex-officio the Rio Grande Compact Commissioner for New Mexico. The Rio Grande Compact Commissioner for Texas shall be appointed by the Governor of Texas. The President of the United States shall be requested to designate a representative of the United States to sit with such Commission, and such representative of the United Sates, if so designated by the President, shall act as Chairman of the Commission without vote.

The salaries and personal expenses of the Rio Grande Compact Commissioners for the three States shall be paid by their respective States, and all other expenses incident to the administration of this Compact, not borne by the United States, shall be borne equally by the three States.

In addition to the powers and duties hereinbefore specifically conferred upon such Commission, and the members thereof, the jurisdiction of such Commission shall extend only to the collection, correlation and presentation of factual data and the maintenance of records having a bearing upon the administration of this Compact, and, by unanimous action, to the making of recommendations to the respective States upon matters connected with the administration of this Compact. In connection therewith, the Commission may employ such engineering and clerical aid as may be reasonably necessary within the limit of funds provided for that purpose by the respective States.

Annual reports complied for each calendar year shall by other diversions from the San Juan River, or its Governors of the signatory States on or before March first following the year covered by the report. The Commission may, by unanimous action, adopt rules and regulations consistent with the provisions of this Compact to govern their proceedings.

The findings of the Commission shall not be conclusive in any Court or tribunal which may be called upon to interpret or enforce this Compact.

Article XIII.

At the expiration of every five-year period after the effective date of this Compact, the Commission may, by unanimous consent, review any provisions hereof which are not substantive in character and which do not affect the basic principles upon which the Compact is founded, and shall meet for the consideration of such questions on the request of any member of the Commission: provided, however, that the provisions hereof shall remain in full force and effect until changed and amended within the intent of the Compact by unanimous action of the Commissioners and until any changes in this Compact are ratified by the legislatures of the respective states and consented to by the Congress, in the same manner as this Compact is required to be ratified to become effective.

Article XIV

The schedule herein contained and the quantities of water herein allocated shall never be increased

nor diminished by reason of any increases or diminution in the delivery or loss of water to Mexico.

Article XV.

The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby, and to the development thereof, have actuated this Compact and none of the signatory states admits that any provisions herein contained establishes any general principle or precedent applicable to other interstate streams.

Article XVI.

Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties or to the Indian tribes, or as impairing the rights of the Indian Tribes.

Article XVII.

This Compact shall become effective when ratified by the legislatures of each of the signatory states and consented to by the Congress of the United States. Notice of ratification shall be given by the Governor of each state to the Governors of the other states and to the President of the United States, and the President of the United States is requested to give notice to the Governors of each of the signatory states of the consent of the Congress of the United States.

In Witness Whereof, the Commissioners have signed this Compact in quarduplicate original one of which

shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, in the State of New Mexico, on the 18th day of March, in the year of our Lord, One Thousand Nine Hundred and Thirty-eight.

M. C. HINDERLIDER,
THOMAS M. McCLURE,
FRANK B. CLAYTON.

Approved:

S. O. HARPER.

* * * * * * * *

Exhibit "P-9"—Water appropriation for the El Paso Irrigation Canal made by A. M. Loomis, and Others, July 1889:

Exhibit "P-10"—Amended Appropriation for the El Paso Irrigation Canal dated 7 29 1889 by Loomis and Others:

Omitted from the Printed Record, Pursuant to Designations of Counsel as to Printing Record copied at pages 1 et seq.

* * * * * * * *

Plaintiff's Exhibit 11, having been received in evidence by the Court, reads in words and figures as follows:

"P-11".

A. M. Loomis,
S. W. Russell,
R. L. Mayer,
A. Blacker,
E. S. Newman,
S. G. Etheridge,
W. M. James,
J. W. Eubanks.

To El Paso Irrigation Company.

Deed.

The State of Texas,
County of El Paso.
Know All Men By These Presents:

That we, A. M. Loomis, S. W. Russell, R. L. Mayer, A. Blacker, E. S. Newman, S. G. Etheridge, W. M James and J. W. Eubank, of the County of El Paso in the state aforesaid, for and in consideration of Twenty Five hundred dollars to us in hand paid by the El Paso Irrigation Company have granted, sold and conveyed and by these presents do grant, sell and convey unto the said El Paso Irrigation Company of the City of El Paso and County and State aforesaid, all our rights, title and interest in and to that certain water appropriation consisting of one headgate and that certain projected canal beginning below the falls at Hart's Mills in said City at the point of rocks and marked by a stone monument or mound, six hundred and fifty feet up the river from the Santa Fe R. R. well on the east bank of the Rio Grande and running

in a general south easterly course passing thro' said City on the most practicable route to Fabens in said County and particular described in said appropriation and maps attached thereto, filed July 6, 1889 and amended, and amendment filed on the 10th day of August, A. D. 1889, in the office of the County Clerk of said County to which reference is hereby made for a more particular description.

To Have and to hold the above described appropriation, Canal and right of way, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said El Paso Irrigation Company and its assigns and successors forever, for the purposes of constructing said Canal and conducting and distributing water at reasonable prices for irrigation and such other objects as are specified in said appropriation.

Witness our hands this 1st day of August, A.D. 1889.

A. M. LOOMIS.
S. W. RUSSELL.
R. L. MAYER.
A. BLACKER.
E. S. NEWMAN.
S. G. ETHERIDGE.
W. M. JAMES.
J. W. EUBANK

The State of Texas.
County of El Paso.

Before me, W. B. McLachlen, a Notary Public in and for El Paso County, Texas, on this day personally appeared A. M. Loomis, S. W. Russell, R. L.

Mayer, A. Blacker. E. S. Newman, S. G. Etheridge, W. M. James and J. W. Eubank, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 1st day of August, A. D. 1889.

W. B. McLACHLEN,
(Seal) Notary Public, El Paso Co., Texas.

Filed Aug. 10th 1889 at 10. A.M.

Recorded Sept. 24th 1889 at 12. M.

B. G. THOMAS,
Clk. Co. Ct. El Paso Co., Texas.

The State of Texas,
County of El Paso.

I, Raymond L. Telles, Jr., County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Deed From A. M. Loomis et al. To El Paso Irrigation Co. Dated the 1st day of August 1889, as the same appears of record in the Deed Records of said County in Volume 17, Page 387, thereof.

Given under my hand and seal of office, at office, in El Paso, Texas, this the 8 day Mar. A.D. 1952.

RAYMOND L. TELLES, JR.,
County Clerk.
By (S.) EMILIE G. MORROW,
Deputy.

Mr. Edwards:

We next offer a document which is marked "Plaintiff's Exhibit No. 12" (Reporter marks same "P-12"), which is a Deed from W. W. Turney, Master Commissioner, to Thomas Worthington, April 9, 1898, in a proceeding in a Federal Court here in El Paso, whereby he conveyed all of the interest which the El Paso Irrigation Company had to Thomas Worthington. (Same was then shown to opposing counsel.)

Mr. Grambling:

No objection.

Plaintiff's Exhibit 12, having been received in evidence by the Court, reads in words and figures as follows:

"P-12"

Deed.

The State of Texas:
County of El Paso.

Whereas, on the 26th day of October, A. D. 1895, the Circuit Court of the United States for the Western District of Texas, sitting at El Paso, in Cause No. 32, in Equity, styled Thomas Worthington, Complainant, vs. The El Paso Irrigation Company, Defendant, a decree was made foreclosing a mortgage made by said defendant to secure certain bonds issued by it, and adjudging that there was due on said bonds the sum of $57,780.00, of which $50,000.00 bears interest at the rate of eight per cent per annum, and $7,780.00 bears interest at the rate of six per cent per annum.

each from the 31st day of December, 1891, and ordering the sale of the property hereinafter described in one lot as a whole without an appraisement or right of redemption, at public auction to the highest bidder therefor between the hours of ten A.M. and four P.M. at the Courthouse of the County of El Paso, state of Texas, on a day to be named by the Master Commissioner in said decree appointed, in the notice of sale given by him, and that before making said sale said Master Commissioner did publish a notice thereof once in each week, for four successive weeks prior to said sale in a newspaper published in said County of El Paso, State of Texas, and appointing W. W. Turney, Esquire, Master Commissioner, to make said sale, and requiring the purchaser to pay at the time of sale the sum of One Thousand Dollars in cash or certified check, and that the fund arising from said sale should be applied as follows:—

1st. To the payment of all proper expenses attendant upon said sale, including the expense, outlays, and compensation of the Master Commissioner to make said sale as such expenses, outlays, and compensation may be thereafter fixed and allowed by said Court.

2nd. To the payment of taxes on the property, such indebtedness of the receiver and such preferential claims and liabilities as the Court may charge as liens upon the said mortgaged property or any part thereof, as prior to lien of the mortgage in said Cause foreclosed, also including such compensation as the Court may allow the receiver and the special master appointed herein.

3rd. To the payment of the costs of said suit, and the compensation of the State Trust Company of New York, as trustee in said mortgage and such solicitors and counsel fees and disbursements as may be fixed and allowed by the Court as entitled to priority over said mortgage debt, which rights of the State Trust Company are by said decree passed and adjusted to said plaintiff, Thomas Worthington.

4th. To the payment of the bonds and coupons of the defendant, mortgagor, to the amount foreclosed, secured by the mortgage foreclosed in said cause, and

Whereas, said Master Commissioner did in accordance with said order advertise said property for sale on the 7th day of April, 1896, (the same being the first Tuesday in said month), at the time and in the manner prescribed in said decree by publishing a notice thereof in the Evening Tribune, a newspaper published in said El Paso County, State of Texas, once a week for four consecutive weeks before said sale day, and did on said 7th day of April, 1896, in pursuance to said advertisement, offer said property for sale as a whole in one lot, at the Courthouse of El Paso County aforesaid to the highest bidder, without appraisement or right of redemption, and the plaintiff, Thomas Worthington, having bid for said property the sum of Sixty Thousand Dollars, and that being the highest and best bid therefor, said property was struck off to said Thomas Worthington at said price, and

Whereas, said purchaser immediately complied with so much of the decree aforesaid as required the deposit of a certified check for One Thousand Dollars with the Master Commissioner, and

Whereas, said decree required said Master Commissioner to deliver to the purchaser at said sale a deed of conveyance of said property to the purchaser at said sale on the further order of said Court, and

Whereas, said Master Commissioner did on the 18th day of April, 1896, report said sale to said Court, and said Court did on the 20th day of October 1896, approve said sale and order that said Master Commissioner make to said purchaser a proper conveyance of said property, upon said purchaser paying the amount of said bid as follows: First, by producing satisfactory evidence to the Master Commissioner that he had paid off the following claims, to-wit: $100.00 to W. W. Turney, Master Commissioner; $400.00 to W. W. Turney, as special master; various claims shown by order of said Court, made on the 20th day of October, 1896, to be due by the receiver in said cause amounting to $1009.90; $1250.00 due Edwards & Neill, by plaintiff as subrogated to the rights of the Central Trust Company; all costs in said cause, to the payment of which claims said decree directs the Master Commissioner, to apply the $1000.00 paid by the purchaser at the time of said sale, and by paying the balance of said purchase price, first, in receiver's certificates issued by order of said Court in said cause, to be canceled by said Master Commissioner, and crediting the balance, if any, on the bonds sued on in said cause, and

Whereas, said purchaser has produced evidence to said Master Commissioner that he has paid off all of said claims above recited, amounting, including the compensation due receiver as costs of Court to the sum of Forty-eight hundred and fifty-five 85/100 Dol-

lars, and has delivered to the Master Commissioner, to be canceled, receiver's certificates issued by this Court in this cause to the amount of the balance of said Sixty Thousand Dollars, all of which is shown by the report of said Master Commissioner, filed in said cause April 9th, 1898, and approve by said Court on the 9th day of April, 1898, and

Whereas, said Court in said order of the 20th of October, 1896, approving said sale, modified so much of said decree of the 26th of October 1895, as required the taxes to be paid on said property out of the proceeds of said sale, and directed the Master Commissioner to state in the conveyance of said property to said purchaser, that the same is made subject to the lien of any and all state, county and municipal taxes.

Now, Therefore, Know all men by these Presents, That I, said W. W. Turney, of the County of El Paso, State of Texas, Master Commissioner, as aforesaid, in consideration of the premises, and the payment of said sum of Sixty-Thousand ($60.000.00) Dollars, by said Thomas Worthington, of the City of Birmingham, England, in the manner above recited, have bargained, sold and conveyed, and by these presents do bargain, sell and convey unto the said Thomas Worthington, all the estate, right, title and interest, which the said El Paso Irrigation Company had on the 14th day of March 1890, or at any time afterwards, in and to the following premises, property and franchises, to-wit: The same being situated in the County of El Paso, State of Texas and described as follows:—

"All and singular the water-way or canal for irrigating purposes known as the "El Paso Irrigation Canal" and being the same appropriated by the sworn statement of A. M. Loomis and others; and which is more particularly described as follows, to-wit: Situated in El Paso County, Texas, beginning at a point or rock in the Rio Grande above the city of El Paso, 650 feet more or less above the old Santa Fe Railroad well, from which beginning point an alamo bears N. 6°33' E. 67-2/10 feet and another alamo bears W. 22°50' W.93-5/10 feet; thence S. 56°45' E. at 1000 feet ascends high bank, at 1075 feet change course. Thence following the bank of the Rio Grande as follows: S.45°30'E. 1725 feet, S.53°27'E. 2050 feet, S.41°30'E.1157 feet to the center of Eighth Street, in the City of El Paso; thence N.74°50'E. Following the center of Eighth Street at 828 feet center of Santa Fe street railway track, at 1175 feet center of Atchison, Topeka and Santa Fe Railway track. At 1493 feet center of switch of said Atchison, Topeka and Santa Fe Railway. At 2181 feet center of El Paso Street Railway track. At 2513 feet center of Texas and Pacific Railway track. At 2793 change course. Thence N.74°30'E. following the center of said 8th street. At 3032 feet center of the Kansas City, El Paso and Mexican Railroad track, at 3853 feet change course. Thence N. 18°30'E. 1047 feet; thence N.16°27'E. 913 feet; thence N.28°07'W.487 feet; thence N.13°00'E. 250 feet; thence N.6°05'E. 250 feet; thence N.27°45'E. 445 feet; thence N.1222 feet along the line between Cotton and Bassetts' Additions in the City of El Paso; thence N.52°40' East at 2520 feet, the west line of East El Paso Town Track. At 2826-6/10 feet change course. Thence East 3452-4/10 feet; thence S.58°45'E. 2172 feet; thence N.83°34'E. 4634

feet along old Texas & Pacific grade; thence N.44° 34′ E. 541 feet; thence N.75°34′E. 1939 feet; thence S.65°24′ E. 1370 feet; thence S.52°15′ 200 feet; thence S.65°34′E. 1350 feet; thence N.69° E. 245 feet; thence N.88°45′ E. 1850 feet; thence S.67° 45′ E. At 383 feet center of County road; at 483 feet change course. Thence S.21°30′ E. 1217 feet; thence S.36° 15′ E. 400 feet; thence S.51° E. At 400 feet crosses west line of Ysleta grant. At 1845 feet a point 50 feet from rights of way of G.H. & S.A.R.R. Thence S.45° 14′ E. 16955 feet running 50 feet from and parallel to said G.H. & S.A. right of way; thence 2400 feet to a point 20 feet from center of old Texas and Pacific Railway grade; thence S46°18′E. 10,383 feet along said Texas and Pacific grade; thence 500 feet crossing said Texas and Pacific grade to south side; thence S.46°18′E. 1610 feet along south side of said grade; thence 39° E. 984 feet along south side of said grade to a point on west side of street leading from Ysleta town to depot; thence S.38°E. 5406 feet along south side of said grade; thence S.36°15′E. along south side of said grade at 800 feet more or less east line of Ysleta grant and west line of Socorro grant. At 28.000 feet change course: thence S.15°05′ E. At 4200 feet more or less. east line of Socorro grant and west line of San Elizario grant. At 5230 feet change course; thence S.23°55′E. 9570 feet: thence S.38°55′E. 27.200 feet: thence S.48°21′E. 16.454 feet to a point 25 feet from center of old Texas and Pacific grade; thence S.36°42′E. 4856 feet along old Texas and Pacific grade. Entire distance being 30-½ miles more or less. Said Canal being of following dimensions. to-wit:

For the first four miles it is 30 feet wide.

For the second four miles 25 feet wide.

For the third four miles 24 feet wide.

For the fourth four miles 22 feet wide.

For the fifth four miles 20 feet wide.

For the Sixth four miles 18 feet wide.

And, for the balance of the distance, 6-½ miles, more or less, 15 feet wide, together with all the dams, wing dams, flumes, reservoirs, dikes, lakes, ponds, wells, lands, streams of water, water rights, and water appropriation, and rights of way and franchises now constructed, held or owned by said Company on the 14th day of March, 1890, and thereafter be constructed, held or acquired by said El Paso Irrigation Company; also the corporate franchises, and rights of said party of the first part, its rights of way and franchises, and the right of way and franchises; also all the rights, title and interest acquired by said company by said party of the first part, by virtue of the sworn statement and appropriation of the "El Paso Irrigation Canal" and amended statements of appropriation made by A. M. Loomis and others, together with all the uses with servitudes, equipments and all other things belonging and appurtenant to said Canal, and its lateral and branch ditches now constructed, owned or held, or to be hereafter constructed, acquired and held, by the said party of the first part.

This conveyance is made subject to the lien of any and all state, county and municipal taxes on said property.

To have and to hold the above described premises, property and franchises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said Thomas Worthington, his heirs and assigns forever, as fully and absolutely as I, said W. W. Turney, as Master Commissioner, can convey the same by virtue of the premises and the decree and orders above recited.

Witness my official signature, this the 9th day of April, A. D. 1898.

W. W. TURNEY,
Master Commissioner.

State of Texas,
County of El Paso.

Before me, Peyton J. Edwards, a Notary Public in and for El Paso County, Texas, on this day personally appeared W. W. Turney, knowr to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same in the capacity therein stated for the purposes and consideration therein expressed.

Given under my official signature and seal, this the 9th day of April, 1898.

PEYTON J. EDWARDS,
(Seal) Notary Public, El Paso County, Texas.

Filed for Record April 11, 1898, at 2:40 o'clock P.M.

Recorded April 12, 1898 at 10 o'clock A.M.
PARK W. PITMAN,
County Clerk.
By WILLIAM ARNOLD,
Deputy.

The State of Texas,
County of El Paso.

I, Raymond L. Telles, Jr., County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Deed from W. W. Turney to Thomas Worthington Dated the 9 day of April 1898, as the same appears of record in the Deed Records of said County in Volume 38 page 440 thereof.

Given under my hand and seal of office, at office, in El Paso, Texas, this the 4 day Mar. A.D. 1952.

RAYMOND L. TELLES, JR.,
County Clerk,
By EMILIE G. MORROW,
Deputy.

(Seal)

Mr. Edwards:

We next offer a document (same marked "P-13" by the Reporter) which is marked as Plaintiff's Exhibit No. 13, and which is a deed from Thomas Worthington to the Franklin Irrigation Co. dated June 16, 1898, and recorded in Book 38, Page 607 of the Deed Records of El Paso County, Texas.

Mr. Grambling:

No objection.

Plaintiff's Exhibit 13, having been received in evidence by the Court, reads in words and figures as follows:

"P-13".

The .....,
County of .....

Know All Men By These Presents:

That I, Thos. Worthington, of the City of Manchester, England, Banker, at present resident at Buenos Ayres in South America, in consideration of the sum of One Hundred and Twenty-Five Thousand (125,000.00) Dollars, paid and secured to be paid by Franklin Irrigation Company of El Paso, Texas, as follows:—1st:—495 shares of paid up stock of said Franklin Irrigation Company, each share being at the value of One Hundred Dollars, being in all Forty Nine Thousand Five Hundred ($49,500.00) Dollars. 2nd:—Fifty Thousand Dollars ($50,000) in 6% (six percent) Bonds of the said Company to be secured by a first Mortgage or Deed of Trust of the Company. 3rd:—Twenty Five Thousand Five Hundred Dollars ($25,500) in Cash to be paid on the execution hereof or to be secured by the note of the said Company. The receipt of all which is hereby acknowledged, have Granted, Bargained, Sold and Conveyed, and by these presents do Grant, Bargain, Sell and Convey unto the said Franklin Irrigation Company all the property and franchises of the El Paso Irrigation Company conveyed to me on the 9th day of April 1898, by W. W. Turney, Master Commissioner, said deed recorded in Vol. 38, Pages 440 to 445 of the Deed Records of El Paso County, Texas. Said property is described as follows:

"All and singular the waterway or Canal for the irrigating purposes formally known as the "El Paso Irrigation Canal" and being the same appropriated by the sworn statement of A. M. Loomis and others; and which is more particularly described as follows, to-wit: Situated in El Paso County, Texas, beginning at a point of rock in the Rio Grande above the City of El Paso, 650 feet more or less above the old Santa Fe Railroad well, from which beginning point an alamo bears N.6°35′ E. 67-2/10 feet and another alamo bears N.22°50′ W. 93-5/10 feet. Thence S.56° 45′E. at 1000 feet ascends high bank at 1075 feet change course. Thence following the bank of the Rio Grande, as follows:—S.45°30′E. 1725 feet, S.53° 27′ E.2050 feet, S.41°30′E. 1157 feet to the center of Eighth Street in the City of El Paso; thence N.74° 50′E. following the center of Eighth Street at 828 feet center of Santa Fe Street railway track, at 1175 feet center of Atchison, Topeka and Santa Fe Railway track, at 1493 feet center of switch of said Atchison, Topeka and Santa Fe Railway, at 2181 feet center of El Paso street railway track. At 2513 feet center of Texas and Pacific Railway track. At 2793 change course.

Thence N.74°30′ E. following the center of said 8th Street, at 3032 feet center of the Kansas City, El Paso and Mexican Railroad track. At 3853 feet change course: Thence N.18°30′E. 1047 feet; thence N. 16° 27′E. 913 feet; thence N.28°07′W. 487 feet; thence N. 13°00′E. 250 feet; thence N. 6°.05′E. 250 feet; thence N.27°45′E 445 feet; thence N. 1222 feet along the line between Cotton and Bassett's Additions in the City of El Paso; thence N.52°40′ East at 2520 feet, the West line of East El Paso Town Tract, at 2826-6/10 feet

change course. Thence East 3452-4/10 feet; thence S.58 45'E.2172 feet; thence N.83 34'E.4634 feet along old Texas & Pacific grade; thence N.44 34'E. 541 feet; thence N.75 34'E. 1939 feet; thence S.65 24'E. 1370 feet; thence S.52 15'E. 200 feet; thence S.65 34'E. 1350 feet; thence N.69 E.245 feet; thence N. 88 45'E.1850 feet; thence S.67 45'E. at 383 feet center of county road. At 483 feet change course, thence S.21 30'E. 1217 feet; thence S.36 15'E. 400 feet; thence S.51 E. At 400 feet crosses west line of Ysleta grant. At 1845 feet a point 50 feet from right of way of G.H. & S.A. R.R. Thence S.45 14'E 16,955 feet, running 50 feet from the parallel to said G.H. & S.A. right of way; thence 2400 feet to a point 20 feet from center of Old Texas and Pacific Railway grade; thence S.46 18'E. 10,383 feet along said Texas and Pacific grade; thence 500 feet crossing said Texas and Pacific grade to South side; thence S.46 18'E. 1610 feet along South side of said grade; thence S. 39 E.984 feet along South side of said grade to a point on West side of street leading from Ysleta town to depot; thence S.38 E. 5406 feet along South side of said grade; thence S.36 15'E. along South side of said grade at 800 feet more or less East line of Ysleta Grant and West line of Socorro grant at 28,-000 feet change course. Thence S.15 05'E. at 4200 feet more or less, East line of Socorro grant and West line of San Elizario grant. At 5230 change course. Thence S.23 55'E. 9570 feet; thence S.38 55'E. 27,200 feet; thence S.48 21'E. 16,454 feet to a point 25 feet from Center of old Texas and Pacific grade; thence S.36 42'E. 4856 feet along old Texas and Pacific grade. Entire distance being 30-½ miles more or less.

Said Canal being of following dimensions, to wit: For the first four miles it is 30 feet wide. For the

second four miles 25 feet wide. For the third four miles 24 feet wide. For the fourth four miles 22 feet wide. For the fifth four miles 20 feet wide. For the sixth four miles 18 feet wide. And for the balance of the distance, 6-½ miles, more or less, 15 feet wide. Together with all the dams, wing-dams, flums, reservoirs, dikes, lakes, ponds, wells, lands, streams of water, water rights, and water appropriation, and rights of way and franchises now constructed, held or owned by said Company on the 14th day of March 1890 and thereafter be constructed, held or acquired by said El Paso Irrigation Company and its successors; also the corporate franchises and rights of said El Paso Irrigation Company and its successors, its rights of way and franchises, and the right of way and franchises; also all the rights, title and interest acquired by said El Paso Irrigation Company and its successors by virtue of the sworn statement and appropriation of the "El Paso Irrigation Canal" and amended statements of appropriation made by A. M. Loomis and others, together with all the uses and servitudes, equipments and all other things belonging and appurtenant to said canal, and its lateral and branch ditches now constructed, owned or held, or to be hereafter constructed, acquired and held by said El Paso Irrigation Company and its successors, also all the property of every nature, rights of way and franchises, acquired by me as Trustee to this date, connected with said canal either by deed or contract reference is made to the said right of way deeds or contract to me, or to me as Trustee on record in El Paso County, Texas, for a more particular description of the different tracts hereby conveyed.

Together with all and singular, the rights, members, hereditaments and appurtenances to the same,

or in anywise incident or appertaining. To Have and To Hold, all and singular, the said premises unto the said Franklin Irrigation Company, their successors and assigns forever. And I hereby bind myself and my heirs, executors and administrators, to Warrant and forever Defend all and singular the said premises unto the said Franklin Irrigation Company, their successors and assigns against every person whomsoever lawfully claiming or to claim the same, or any part thereof, by, through or under me, in respect of all or any acts of mine during the period I have held title to the said premises, except for any unpaid taxes against said property.

Witness my hand this sixteenth day of June A.D. 1898.

THOS. WORTHINGTON.

The Argentine Republic,
Buenos Ayres.

Before me, D. Mayer, U. S. Consul at Buenos Ayres, personally appeared Thomas Worthington, Known to me to be the person whose name is subscribed in the foregoing instrument, and acknowledged to me that he executed and delivered the same for the purposes and consideration herein expressd.

Given under my hand and seal of office, this 16 day of June A. D. 1898.

D. MAYER,
U. S. Consul.

(Seal)

Filed for Record August 10th A. D. 1898 at 11:55 o'clk A.M. and duly recorded August 16th A.D. 1898 at 9:45 o'clock A.M.

PARK W. PITMAN,
Clerk, County Court, El Paso County, Texas.

The S .e of Texas,
County of El Paso.

I, Raymond L. Telles, Jr., County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the Deed from Thomas Worthington to Franklin Irrigation Co. Dated The 16 day of June 1898, as the same appears of record in the Deed Records of said County in Volume 38, Page 607 thereof.

Given under my hand and seal of office, at office, in El Paso, Texas, this the 4 day Mar A.D. 1952.

RAYMOND L. TELLES, JR.,
County Clerk,
By (S.) EMILIE G. MORROW,
Deputy.

(Another instrument was then marked for identification as Plaintiff's Exhibit 14.)

Mr. Edwards:

We next offer document marked "Plaintiff's Exhibit No. 14", which is a certified copy of the deed from the Franklin Irrigation Company to the United States of America, October 14, 1912, covering all the water rights that have been brought forward from all of the other deeds and all of the interest of the company in the canal, and recorded in Book 203, Page 455 of the Deed Records of El Paso County, Texas.

Mr. Grambling:
No objection.

Plaintiff's Exhibit 14, having been received in evidence by the Court, reads in words and figures as follows:

"P-14".

Warranty Deed.

This Indenture, made this 14th day of October, in the year of our Lord one thousand nine hundred and twelve between the Franklin Irrigation Company, a corporation duly organized and existing under and by virtue of the laws of the State of Texas, having its office and principal place of business in the City of El Paso in the said State of Texas, acting by and through Felix Martinez, its President, thereunto duly authorized, party of the first part, and the United States of America, acting pursuant to the provisions of the act of Congress approved June 17, 1902 (32 Stat., 388), party of the second part.

Witnesseth: That—

The said party of the first part, for and in consideration of the sum of one hundred and twenty thousand dollars ($120,000), lawful money of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, conveyed, released and confirmed, and by these presents does hereby grant,

bargain, sell, remise, convey, release and confirm unto the said party of the second part, its successors and assigns forever,

All that certain water-way or canal for irrigating purposes, formerly known as the "El Paso Irrigation Canal," and more particularly described as follows: Beginning at a point on the east bank of the Rio Grande whence the cupola of the Union Station in the city of El Paso, Texas, bears south 73°58' east 2752 feet, and whence the cupola on the United States Postoffice in said city of El Paso bears south 87°15' east 4988 feet; Thence south 56 30' east 1032 feet; Thence south 51 30' east 691 feet; Thence south 48 30' east 4248 feet to an intersection with the center line of Eighth Street; thence north 74°30' east along the center line of said Eighth Street, a distance of 6408 feet; thence north 36r30' east 170 feet; thence north 3135' east 225 ftet; thence north 17°45' east 1114 feet; thence north 6 55' west 1058 feet; thence north 24°21' east 627 feet; thence north 0°10' west 1203 feet to an intersection with the center line of East Canal Street; thence north 52 45' east along said East Canal Street, a distance of 3095 feet;

Thence south 89 40' east 4972 feet to the west boundary line of Washington Park;

Thence south 0'15' west 1135 feet along the west boundary line of said Washington Park;

Thence north 83 45 east 4876 feet;

Thence north 45 15' east 563 feet;

Thence north 75°53′ east 1595 feet;

Thence north 79°40′ east 347 feet;

Thence south 65°22′ east parallel with the county road, a distance of 2550 feet;

Thence north 88°20′ east 2522 feet;

Thence south 20°40′ east 1473 feet;

Thence south 54°21′ east 675 feet;

Thence south 35°10′ east 410 feet;

Thence south 50°18′ east 1190 feet;

Thence south 45°0′ east, parallel with the G.H. & S. A. Ry. track, a distance of 11,400 feet;

Thence south 45°15′ east parallel with the G. H. & S.A. Ry. track, a distance of 5460 feet;

Thence south 9°30′ east 2385 feet;

Thence south 46°35′ east 1755 feet to a point opposite the town of San Jose;

Thence south 37°24′ east 107 feet;

Thence south 46°44′ east 3263 feet;

Thence south 40°48′ east 630 feet;

Thence south 46°40′ east 2348 feet;

Thence south 55°54′ east 190 feet;

Thence south 45°40′ east 2610 feet;

Thence south 34°50′ east 190 feet;

Thence south 46°25′ east 735 feet;

Thence south 43°43′ east 650 feet;

Thence south 40°36′ east 468 feet, to a point opposite the town of Ysleta;

Thence south 37 20′ east 4680 feet;

Thence south 37°12′ east 5815 feet;

Thence south 29°30′ east 355 feet;

Thence south 36°26′ east parallel with the county road 3235 feet;

Thence south 38 0′ east, parallel with the county road 1086 feet;

Thence south 32°5′ east parallel with the county road 285 feet;

Thence South 36°20′ east parallel with the county road 18.235 feet;

Thence south 15°6′ east 5285 feet;

Thence south 23 47′ east 9550 feet;

Thence south 38°36′ east 17,370 feet;

Thence south 48°13′ east 10,680 feet;

Thence north 69°25′ east 1035 feet;

Thence south 60°13′ east 420 feet;

Thence south 36°14′ east, parallel with the county road 5162 feet;

Thence south 39°24′ east, parallel with the county road 4120 feet;

Thence south 35°35′ west 720 feet, to a point on the bank of the Rio Grande, about one mile north of the town of Fabens, Texas; also the additional right of way claimed by the said vendor and situated easterly of the easterly end of said canal and desagua thereof, and which additional right of way is shown by deed executed to the former owners of the canal under and through whom the said vendor claims title and which description is more fully shown by deeds now of record in the office of the Clerk of the County Court of El Paso County, Texas, to the record of which deeds for a more particular description reference is hereby made;

Also that additional land, right of way, or easement and all rights acquired by the Franklin Irrigation Company, and now owned and held by it, northwesterly of and above the properties hereinbefore described, and situated between the headgate which is the beginning point of the description herein before made, and which is usually known as the "old head-

gate", and the present headgate above what is known as the "Mexican Dam," which properties and rights are more particularly described as follows, to-wit:

Beginning at a stake set on the north bank of the Rio Grande on the east line of the Old Fort Bliss Military Reservation produced, and from said stake on the southeast corner of old Fort Bliss Military Reservation bears north 550 feet;

Thence along the north boundary line of canal right of way south 86 30′ west 50 feet;

Thence north 86 30′ west 200 feet;

Thence south 83 west 100 feet;

Thence north 88 west 172.5 feet;

Thence north 49 30′ west 195.3 feet;

Thence north 85 west 168.5 feet, to the bank of the Rio Grande;

Thence south 19 east with said Rio Grande 54.7 feet to a stake set for the south boundary of said canal right of way which is 50 feet;

Thence south 85 east 130.3 feet;

Thence south 49 30′ east 196.8 feet;

Thence south 88 east 193.9 feet;

Thence north 83 east 99.3 feet;

Thence south 86°30′ east 198.4 feet;

Thence north 86°30′ east 50 feet to a stake from which stake the place of beginning bears north 50.1 feet;

Thence south 25.4 feet;

Thence north 83°30′ east 131.8 feet;

Thence south 54° east 49.8 feet;

Thence south 37°30′ east 132.9 feet;

Thence south 62°30′ east 164.4 feet;

Thence south 56°50′ east 160.2 feet;

Thence south 35°10′ east 242.7 feet;

Thence south 48° east 104.8 feet;

Thence souht 55° east 134.4 feet. to a point opposite the center of old headgate;

Thence north 43°30′ east across said old headgate 75 feet to a stake set for the north right of way line of said canal;

Thence north 55° west along said right of way line 129.3 feet;

Thence north 49° west 91.6 feet;

Thence north 35°10′ west 248.4 feet;

Thence north 56°50′ west 177 feet;

Thence north 62°30′ west 151.2 feet;

Thence north 37°30′ west 127.1 feet;

Thence north 54° west 89.9 feet;

Thence south 83°30′ west 152.9 feet, to above described place of beginning located south 550 feet on the east boundary line of old Fort Bliss Military Reservation extended; said last property hereinbefore described being according to the survey made by R. Montijo, Civil Engineer, on October 9, 1911, a tracing of which is now in the possession of the officials of the Reclamation Service;

Also the following tract or parcel of land and right of way now held under deed placed in escrow, and which is to be delivered to the United States upon the execution of the deed by the vendor, as hereinafter provided and which tract of land covers a portion of the last description, and is more particularly described as follows, to-wit: Beginning at a stake on the north bank of the Rio Grande and on the north boundary line of the Franklin Irrigation Canal right of way for the northeast corner of this survey;

Thence north 80°15′ west 170 feet to a stake set on the bank of the Rio Grande and on the north boundary line of the Franklin Irrigation Canal right of way for the northwest corner of this survey;

Thence south 32°45′ west 65 feet to a stake set for the southwest corner of this survey;

Thence south 50°15' east down the Rio Grande 170 feet to a stake set for the southeast corner of this survey;

Thence north 32 45' east 65 feet to the place of beginning.

It being extended to include in the last two preceding or foregoing descriptions the right of way and all right acquired under and by reason of condemnation proceedings as shown by the judgment of the County Court, El Paso County, Texas, duly entered upon the minutes of said Court in Vol. 9, Page 205 et seq., to which reference is hereby made and it being intended to include in said description all the rights of way and rights of every description acquired by the Franklin Irrigation Company Under Art. 3126 of the Revised Statutes of the State of Texas, being a portion of the Act of Legislature of Texas, duly enacted and approved by the Governor of the State of Texas, on the 9th day of March A.D. 1895; as well as all rights growing out of the construction of said canal from what is known as the old lower headgate to its present or upper headgate upon the public domain of the State of Texas in the bed of the Rio Grande between the north bank thereof and the center of the river which constitutes the international boundary line between the State of Texas and the Republic of Mexico.

Also including the right of way acquired by purchase, together with all dams, wingdams, revetments flumes, dikes, desaguas, spillways, lakes, ponds, wells, water appropriations, right of way and franchises, whether acquired by contract, donation, limitation, prescription, purchase, action of Court, orders of commissioners Court, city ordinances or in what-

ever manner acquired, now held, owned and controlled or claimed by said vendor, in connection with said canal, including all laterals acequias and branch ditches, owned or held by said vendor, and including all the uses and servituted, equipments and all things whatsoever belonging or appurtenant to said canal or its laterals, branch ditches, headgates, or other appurtenant structures or easements and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demands whatsoever of the said party of the first part, either in law or equity of, in and to the above bargained premises, rights and properties, with the hereditaments and appurtenances.

This deed is intended to cover the transfer of the right of way as described in deeds or other instruments of conveyance from the various grantors to the Franklin Irrigation Company and its predecessors in title. Where title is not evidenced by deeds or other instruments of conveyance but rests solely upon limitation and prescription this deed is understood and intended to cover the transfer of right of way reasonably necessary for the successful operation of the canal and appurtenant structures, as they exist under present conditions; said right of way to be fifty (50) feet in width from the canal head to the east line of Washington Park Addition to the city of El Paso, a distance of 27,942 feet, more or less; thence sixty (60) feet in width to the east line of Val Verde Addition to the city of El Paso, a distance of 3,802 feet, more or less; thence eighty (80) feet in width to the end of the Canal, a distance of 132,245 feet, more or less; thence fifty (50) feet in width along the

tail ditch to the Rio Grande, a distance of 720 feet, more or less.

To Have and to Hold, the said premises above bargained, sold and described, with the appurtenances, unto the said party of the second part, its successors and assigns forever; and the said party of the first part, for itself and its assigns, doth covenant and agree to and with the said party of the second part, its successors and assigns, that at the time of the ensealing and delivery of these presents it was well sized, of the premises above conveyed, as of a good, sure, perfect and indefeasible estate of inheritance, in law, in fee simple, and had good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances, of what kind and nature soever, and the above bargained premises in the quiet and peaceable possession of the party of the second part, its successors, heirs and assigns, against all and every person lawfully claiming or to claim, the whole or any part thereof, the said party of the first part shall and will Warrant and Forever Defend.

In Witness Whereof, the said Franklin Irrigation Company by resolution of its stockholders, and of its Board of Directors duly adopted at legal meeting, has caused its corporate name to be hereunto subscribed by its president, and its corporate seal to be hereunto affixed, the day and year above written.

FRANKLIN IRRIGATION CO
By FELIX MARTINEZ.
President.

Attest:

R. A. HUGHES,
Acting Secretary.

(Corp. Seal: Franklin Irrigation Company of El Paso.)

State of Texas,
County of El Paso. ss.

Before Me, Horace B. Stevens, a Notary Public in and for the said County and State, on this day personally appeared Felix Martinez, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same as the act and deed of the Franklin Irrigation Company, a corporation, as the president of said company, and for the purposes and considerations therein expressed.

Given under my hand and seal of office, at the city of El Paso, State of Texas, this 12th day of November, 1912.

HORACE B. STEVENS.
Notary Public.

(Notarial Seal)

My commission expires May 31, 1913.

Filed for record Nov. 12th 1912 at 11:58 A.M.

And recorded Nov. 14th 1912 at 9:36 A.M.

PARK W. PITMAN.
Co. Clerk.
By L. C. BOWLES.
Deputy.

The State of Texas,
County of El Paso.

I, Raymond L. Telles, Jr., County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Warranty Deed From Franklin Irrigation Co. to United States of America Dated the 14 day of October 1912, as the same appears of record in the Deed Records of said County in Volume 203, page 455 thereof.

Given under my hand and seal of office, at office, in El Paso, Texas, this the 4 day Mar. A.D. 1952.

RAYMOND L. TELLES, JR.,
County Clerk,
By EMILIE G. MORROW,
(Seal) Deputy.

Mr. Edwards:

At this point we would like to offer in evidence certain sections of the City Charter of the City of El Paso. I am reading from a mimeographed copy of the complete Charter which was furnished to me a few days ago by Mr. Brockmoller as being correct, and our exhibit consists of Sectiins 1, 2, 33, 35, 36, 37, 56, 92, 93 and 120 only, all offered together as Plaintiffs Exhibit No. 15 (Reporter marks same). I think it would be well to read these sections of the City Charter to the Court. (Mr. Edwards then read Sections 1, 2, 33, 35 and 36.)

The Court:

By the way, there was no referendum election pertinent to this litigation?

Mr. Edwards:

No, your Honor, but when we get through we will show that, it didn't come under these sections, that is why I am reading these sections. (Mr. Edwards then read Sections 37, 56, 92, 93 and 120.)

Plaintiff's Exhibit 15, having been received in evidence and being the sections of the City Charter read by Mr. Edwards as above noted, reads in words and figures as follows:

"P-15".

"Section 1. That all the inhabitants of the City of El Paso, in El Paso County, Texas, as the boundaries and limits of said city are herein established or may be hereafter established shall constitute and continue to be a body politic and corporate by the name and style of the "City of El Paso", and as such they and their successors by that name shall have perpetual succession, and shall have, exercise and enjoy all the rights, immunities, powers, privileges and franchises now possessed and enjoyed by the said City as well as those herein granted or conferred; and shall be subject to all the duties and obligations now pertaining to or incumbent upon said city as a corporation not inconsistent with this Act: they shall be known by the same name in law and thereunder shall be capable of suing and being sued, impleading or being impleaded, answer and being answered in all Courts and places, and in all matters whatsoever: of contracting and being contracted with: may take, acquire, hold and purchase, lease, grant, sell or convey such property, real, personal, or mixed, as the needs or purposes of the corporation may require

either within or without the limits of the city, including real estate without the limits of the City of El Paso, for the burial of the dead, for the erecting or operation of waterworks to supply the city with water, for the establishment and operation of gas or electric light works to supply the city with light, for the establishment of a hospital or hospitals for the reception of persons afflicted with contagious or other diseases, for public parks, for a poorhouse or poorhouses, a workhouse, house of correction, rock pile or quarries for the employment of city convicts, and for any other purpose authorized by this Act; to have a corporate seal, and to prescribe and alter the same at will.

Section 2. The City of El Paso shall have power to enact and to enforce all ordinances necessary to protect health, life and property, and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and its inhabitants; to protect the lives, health and property of the inhabitants of said city, and to enact and enforce any and all ordinances upon any subject; provided, that no ordinance shall be enacted inconsistent with the laws of the State of Texas, or inconsistent with the provisions of this Act; and provided, further, that the specification of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this Act to grant to and bestow upon the inhabitants of the City of El Paso full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this Charter or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas.

Section 33. No ordinance shall be finally adopted until it has been read in open meeting of the City Council at two regular meetings, but this rule may be suspended by unanimous vote of the Aldermen present and with the consent of the Mayor, in case of great public emergency; but when such ordinance carries a grant of franchise no suspension of this rule shall be valid.

Section 35. The right of control, easement, user and the ownership of and title to the streets, highways, public thoroughfares and property of the City of El Paso, its avenues, parks, bridges, and all other public places and property are hereby declared to be inalienable, except by ordinance duly passed by a vote of three-fourths of all the members of the Board of Aldermen and approved by the Mayor; and no grant of any franchise, or lease, or right to use the same, either on, along, through, across, under or over the same to any private corporation or individual, shall be granted by the City Council for a longer period than thirty years.

The City Council, may, upon its own motion, submit any applications or ordinances requesting the granting of franchises or special privileges in or to the streets, public thoroughfares and highways of the City of El Paso, to an election, at which the qualified ad valorem taxpayers shall vote upon the propositions therein submitted, the expense of which election shall be paid by the applicant or applicants therefor. No such franchise shall ever be granted until it has been read in full at two regular meetings of the Council, nor shall any such franchise, grant, right or easement ever be made to any private in-

dividual, corporation, or association unless it provides for adequate compensation therefor, to be paid to the City of El Paso, and in addition to any other form of compensation grantee shall pay annually such a fixed charge as may be prescribed in the franchise. Such grant under and any contract in pursuance thereof shall provide that upon the termination of the grant, the grant as well as the property if any, of grantee, in the streets, avenues and other public places, shall thereupon, without other or further compensation to the grantee, or upon the payment of a fair valuation therefor (the mode of ascertaining which shall be determined in the grant), be and become the property of the City of El Paso, and the grantee shall never be entitled to any payment or valuation, because of any value derived from the franchise or the fact that it is or may be a going concern duly installed and operated.

Every such grant shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates, and to maintain the property in good order throughout the life of the grant.

Section 36 Whenever application is made to the City Council of the City of El Paso for any grant or franchise, lease or right to use the streets, public highways, thoroughfares or public property of the City of El Paso, as provided for in the preceding section of this Act, before such ordinance or franchise is introduced in the City Council, it shall be published in full in some daily newspaper published in the City of El Paso twice, the first publication being made at least one week before same is in-

troduced in the City Council. When the same has been passed on its first reading it shall be laid over for at least one week and published in full one time as finally proposed to be passed. If previous to the next regular meeting, four hundred ad valorem taxpayers of the City of El Paso shall, over their own signatures, request the Council to submit the passage of such ordinance and franchise to a vote of the qualified ad valorem taxpaying voters of the City of El Paso, it shall be the duty of the City Council to submit such question to the qualified ad valorem taxpaying voters of the City, and the council shall order and the Mayor shall issue his proclamation calling such election and such ordinance and franchise shall be printed in full in such proclamation, and shall not thereafter be amended or changed. If, at such election, the majority of the votes shall be in favor of said franchise and ordinance, the same shall thereupon become effective, but if the majority of the votes cast be against said ordinance and franchise, the same shall not pass nor shall it confer any rights, powers or privileges of any kind whatever upon the applicant therefor, and it shall be the duty of the City Council to forthwith repeal said ordinance and franchise.

Section 37. No railroad company, street, steam, nor other kind, no telephone, telegraph, electric light, gas company, nor company of any kind, nor person, nor corporation shall ever occupy or use the streets, highways or public places of the City of El Paso for any purpose whatsoever, without first obtaining the consent of the City Council evidenced by the ordinance duly enacted, and no mere acquiescence or other act or omission of the City Council or city officers shall be held to confer by estoppel or indirec-

tion any such rights and the provisions of this section shall apply to such rights heretofore and now claimed by them.

Section 56. The City Council shall have complete and exclusive control and power over the streets, alleys and highways of the city, and to abate and remove encroachments thereon; to open, alter, close, widen, extend, establish, regulate, sell, lease, grade clean or otherwise improve said streets; provided no street shall ever be closed, sold or leased except for an adequate consideration, and not then except by the vote of at least three-fourths of the Aldermen and the approval of the Mayor; to put drains or sewers therein and to prevent the encumbering thereof in any manner and to protect the same from encroachment or injury; provided, that the city shall not be liable in damages at the suit of any person for injury, either to person or property, arising from an unsafe condition or want of repair of any street, square, alley, plaza, park, sidewalk or public place in the city unless at least ten days before the injury occurred a notice of writing shall have been filed with the City Clerk for the City Council specifically pointing out the nature and exact locality of the defect, obstruction or other thing, that afterward occasions the injury.

Section 92. To provide, or cause to be provided, the city with water; to make, regulate and establish public wells, pumps, and cisterns, hydrants and reservoirs in the streets or elsewhere within the city or beyond the limits thereof, for the extinguishment of fires and the convenience of the inhabitants; to prevent the unnecessary waste of water, and to make

establish and regulate all irrigation ditches and have entire control of the same.

Section 93. To establish, erect, construct, regulate and keep in repair bridges, culverts and sewers, sidewalks and crossways, and to regulate the construction and use of the same, and to abate and punish any obstruction or encroachment thereon.

Section 120. The City Council shall have power to pass, publish or amend or repeal all ordinances, rules and police regulations not contrary to the Constitution of this State, for the good government, peace and order of the city and the trade and commerce thereof, that may be necessary or proper to carry into effect the powers vested by this Act in the city government or any department or office or officer thereof; to enforce the observance of all the rules, ordinances and police regulations, and to punish violations thereof by fines, penalties and imprisonment in a prison, work house or house of detention, or to work on the street or other public work in the discretion of the Court before whom conviction may be had; for any fine, penalty and costs, imposed by the Judge of the Corporation Court in the trial of any cause or complaint before him, execution may issue to collect such fines and costs, to be levied and executed in the same manner that executions are from the district Court. The same shall be issued by the Judge of the Corporation Court to the Chief of Police, who, in levying on property and selling, shall have like power and authority as the sheriff of the county in executions issued from the District Court; and the laws of the State, as far as applicable, shall apply to and be in full force and effect as to the execu-

tions issued from the Corporation Court; and any person upon whom any fine or penalty is imposed may be committed until the payment of the same, with costs, and in default thereof may be imprisoned in the city prison or work house or house of correction, or may be required to work on the streets or other public works of the city for such time and in such manner as may be provided by ordinance; provided that such imprisonment or forced labor shall not exceed that imposed on persons who fail to pay the fines of like amount or penalty assessed by the County Court."

The Court:

I will interrupt there. Mr. Marshall recess Court for ten minutes.

Whereupon a recess was had from 11:00 o'clock A.M. until 11:10 o'clock A.M. the same day, at which time proceedings were resumed as follows:

Mr. Edwards:

We next offer in evidence document marked "Plaintiff's Exhibit No. 16" (Reporter marks same), which is a certified copy of an ordinance of the City of El Paso dated the 5th day of September, 1939. (Reads) "Section 1—"

Mr. Grambing:

Before he reads that we want to object to that ordinance. We want to maintain our position. We think it is an ultra-vires ordinance and it is without consideration and it is contrary to public policy and we think that it is invalid for any purpose in this lawsuit and so expect to show during the trial.

The Court:
Overruled.

Mr. Grambling:
Note our exception.

Plaintiff's Exhibit 16 which was then read by Mr. Edwards was thereupon received in evidence by the Court, and reads in words and figures as follows:

"P-16".

"An Ordinance conveying unto the United States of America all the right, title and interest of the City of El Paso in and to the right-of-way occupied by the Franklin Canal over, along and across all streets, alleys and other public lands of the City of El Paso, with certain reservations and providing for a reverter when the said right-of-way is no longer used for canal purposes, and declaring an emergency, be it ordained by the City Council of the City of El Paso Texas:

Section 1. In consideration of the very great benefits conferred upon the City and County of El Paso and all of the residents thereof by the maintenance and operation of the Rio Grande Reclamation Project, furnishing water for the irrigation of land in the City and County of El Paso, and the further consideration that the maintenance and operation of what is known as the Franklin Irrigation Canal is indispensable to the carriage and distribution of said waters for irrigation purposes, and in accordance with that certain Act of the 45th Legislature of Texas, Chapter 77, (1937), the City of El Paso does hereby convey, transfer, quit-claim, relinquish and confirm unto the

United States of America all of the right, title and interest of the City of El Paso in and to the right-of-way occupied by the said Franklin Canal and the appurtenances thereto, through the City of El Paso and in the present location thereof, over, along and across all streets, alleys and other public lands of the City of El Paso, continuing and confirming the use of said right-of-way as hereinafter described.

Said right-of-way is described in words and figures as follows, to-wit: All parts of streets, alleys and intersections, or any other lands owned by the City of El Paso, within the limits of the following described right-of-way: Beginning at the headgates of said Franklin Canal as constructed in 1914 and enlarged in 1921 by the Bureau of Reclamation; thence to and across the Riverside Drive or Levee Road over land acquired by the United States for the headworks of said canal; thence following along the north or east bank of the Rio Grande over right-of-way acquired by the El Paso Irrigation Company from H. B. Stevens et al. to a point 3,610 feet below the headgates measured on the center line of the canal, being the end of the concrete lined section, 25 feet on each side of the center line of said canal; thence continuing along the north or east bank of the Rio Grande over said acquired right-of-way to Eighth Street 40 feet on each side of the center line of said canal, together with all wasteway or sluiceway channels leading from the canal into the river; thence along Eighth Street to and into property known as the Cotton Estate, a concrete lined section 13 feet on each side of the center line of said canal; thence turning and continuing northeasterly through said Cotton Estate to the intersection of Williams and East San

Antonio Streets 50 feet on each side of the center line of said canal; thence along East San Antonio Street over right-of-way acquired by the El Paso Irrigation Company from the Bassett Addition to Piedras Street 35 feet on each side of the center line of said canal; thence continuing along East San Antonio Street and turning into an alley between Rivera Street and East San Antonio Street to Stevens Street over right-of-way acquired by the El Paso Irrigation Company from the East El Paso Addition 35 feet on each side of the center line of said canal; thence continuing along said alley and turning into Boone Avenue 35 feet on each side of the center line of said canal; thence south along Boone Avenue a distance of approximately 900 feet, and 40 feet on each side of the center line of said canal: thence turning easterly through Washington Park over right-of-way acquired by the El Paso Irrigation Company from J. B. Leahy, and extending on to the city limits, being 40 feet on each side of the center line of said canal; provided, however, there is reserved to the City of El Paso the right to use as a part of the City street system of said city, all bridges heretofore constructed by the Bureau of Reclamation of the United States at the points on said canal where the same is intersected by the following described streets, alleys, or other crossings: S. Santa Fe St., S. El Paso St., S. Oregon St., S. Mesa Ave., S. Stanton St., S. Kansas St. S. Campbell St., S. Florence St., S Ochoa St. S Virginia St. S. St. Vrain St., Hills St., Tays St., Park St., Fourth St., First St., Laurel St., Eucalyptus St., Willow St., Foot Bridge., S. Piedras St., S. Raynor St., S. Estrella St. S. Grama St., S. Stevens St., Hammett Boulevard. Boone Ave. Evergreen St. (In Washington Park), Washington Park East Road. Tobin Place. Alley East of Hadlock Place. Francis

St., and Verde Ave.; provided, however, and this ordinance and the conveyance to be made hereunder are subject to the condition that the United States shall be obligated to maintain the said bridges at the said described crossings, and there is further reserved to the City of El Paso the right to construct and maintain, at its own cost and expense, such additional bridges and other structures across said canal other than those hereinabove designated as it may deem necessary; provided further that if at any time in the future, the Secretary of the Interior of the United States of America or other duly authorized officer of the United States shall decide that the said right-of-way or any part thereof is no longer needed for the operation of said canal or for irrigation purposes, then and in that event whatever rights or title the City of El Paso has conveyed hereunder to the United States as to such part thereof shall thereupon revert to the said City of El Paso, and the obligation of the United States under the conditions hereof to maintain any bridge or bridges situated on such part thereof so reverting to the City shall thereupon terminate, but any such reverter shall leave unaffected whatever right, title or interest the United States may have or acquire in or to the premises described herein other than by virtue of this ordinance or the conveyance executed in pursuance hereof. Should the El Paso County Water Improvement District No. 1 request the execution of a conveyance to the United States in accordance with the terms hereof, the Mayor and City Clerk are hereby authorized to execute and attest the same.

Section 2. The fact that it is immediately necessary to commence work on fencing the right-of-way of the Franklin Canal as a measure of public safety,

and that this work is awaiting the vesting of title in the United States of America to the right-of-way aforesaid, creates a great public emergency justifying the suspension of the rule laid down in Section 33 of the Charter of the City of El Paso providing that no ordinance shall be finally adopted until it has been read in regular meeting of the City Council at two regular meetings, and by unanimous vote of the Aldermen present and with the consent of the Mayor, as in this section provided, said rule is suspended and this ordinance shall take effect immediately upon its passage and approval.

Passed And Approved this 5th day of September, A. D. 1939.

J. E. ANDERSON,
Mayor.

Attest:

W. R. COLLINS,
Clerk.

. . . . . .

Plaintiff's Exhibit 17, having been received in evidence by the Court, reads in words and figures as follows:

An Ordinance amending an ordinance entitled "An Ordinance conveying unto the United States of America all the right, title and interest of the City of El Paso in and to the right-of-way occupied by the Franklin Canal over, along and across all streets, alleys and other public lands of the City of El Paso, with certain reservations and providing for a rever-

ter when the said right of way is no longer used for canal purposes, and declaring an emergency," by inserting therein the clause "contingent, however, upon appropriations being made therefor by Congress," and declaring an emergency.

Be it ordained by the City Council of the City of El Paso, Texas:

Section 1. That Section 1 of that certain ordinance entitled "An ordinance conveying unto the United States of America all the right, title and interest of the City of El Paso in and to the right-of-way occupied by the Franklin Canal over, along and across all streets, alleys and other public lands of the City of El Paso, with certain reservations and providing for a reverter when the said right-of-way is no longer used for canal purposes, and declaring an emergency," passed and approved the 5th day of September, 1939, be and the same is hereby amended so as to hereafter read as follows:

"Section 1. In consideration of the very great benefits conferred upon the City and County of El Paso and all of the residents thereof by the maintenance and operation of the Rio Grande Reclamation Project, furnishing water for the irrigation of land in the City and County of El Paso, and the further consideration that the maintenance and operation of what is known as the Franklin Irrigation Canal is indispensable to the carriage and distribution of said waters for irrigation purposes, and in accordance with that certain Act of the 45th Legislature of Texas, Chapter 77, (1937), the City of El Paso does hereby convey, transfer, quit claim, relinquish and confirm unto the United States of America all of the right,

title and interest of the City of El Paso in and to the right-of-way occupied by the said Franklin Canal and the appurtenances thereto, through the City of El Paso and in the present location thereof, over, along and across all streets, alleys and other public lands of the City of El Paso, continuing and confirming the use of said right-of-way as hereinafter described.

Said right-of-way is described in words and figures as follows, to wit: All parts of streets, alleys and intersections, or any other lands owned by the City of El Paso, within the limits of the following described right-of-way: Beginning at the headgates of said Franklin Canal as constructed in 1914 and enlarged in 1921 by the Bureau of Reclamation; thence to and across the Riverside Drive or Levee Road over land acquired by the United States for the headworks of said canal; thence following along the north or east bank of the Rio Grande over right-of-way acquired by the El Paso Irrigation Company from H. B. Stevens et al. to a point 3,610 feet below the headgates measured on the center line of the canal, being the end of the concrete lined section, 25 feet on each side of the center line of said canal; thence continuing along the north or east bank of the Rio Grande over said acquired right-of-way to Eighth Street 40 feet on each side of the center line of said canal, together with all wasteway or sluiceway channels leading from the canal into the river; thence along Eighth Street to and into property known as the Cotton Estate, a concrete lined section 13 feet on each side of the center line of said canal; thence turning and continuing northeasterly through said Cotton Estate to the intersection of Williams and East San Antonio Streets 50 feet on each side of the center line of said canal; thence along East San Antonio Street over

right-of-way acquired by the El Paso Irrigation Company from the Bassett Addition to Piedras Street 35 feet on each side of the center line of said canal; thence continuing along East San Antonio Street and turning into an alley between Rivera Street and East San Antonio Street to Stevens Street over right-of-way acquired by the El Paso Irrigation Company from the East El Paso Addition 35 feet on each side of the center line of said canal; thence continuing along said alley and turning into Boone Avenue 35 feet on each side of the center line of said canal; thence south along Boone Avenue a distance of approximately 900 feet, and 40 feet on each side of the center line of said canal; thence turning easterly through Washington Park over right-of-way acquired by the El Paso Irrigation Company from J. B. Leahy, and extending on to the city limits, being 40 feet on each side of the center line of said canal; provided, however, there is reserved to the City of El Paso the right to use as a part of the City street system of said city, all bridges heretofore constructed by the Bureau of Reclamation of the United States at the points on said canal where the same is intersected by the following described streets, alleys or other crossings: S. Santa Fe St., S. El Paso St., S. Oregon St., S. Mesa Ave., S. Stanton St., S. Kansas St., S. Campbell St., S. Florance St., S. Ochoa St., S. Virginia St., S. St. Vrain St., Hills St., Tays St., Park St., Fourth St., First St., Laurel St., Eucalyptus St., Willow St. Foot Bridge, S. Piedras St., S. Raynor St., S. Estrella St., S. Grama St., S. Stevens St., Hammett Boulevard, Boone Ave, Evergreen St. (In Washington Park), Washington Park East Road, Tobin Place, Alley East of Hadlock Place, Francis St., and Verde Ave.; provided, however, and this ordinance and the conveyance to be made hereunder are

subject to the condition that the United States shall be obligated to maintain the said bridges at the said described crossings, contingent, however, upon appropriations being made therefor by Congress; and there is further reserved to the City of El Paso the right to construct and maintain, at its own cost and expense, such additional bridges and other structures across said canal other than those hereinabove designated as it may deem necessary; provided further that if at any time in the future, the Secretary of the Interior of the United States of America or other duly authorized officer of the United States shall decide that the said right-of-way of any part thereof is no longer needed for the operation of said canal or for irrigation purposes, then and in that event, whatever rights or title the City of El Paso has conveyed hereunder to the United States as to such part thereof shall thereupon revert to the said City of El Paso, and the obligation of the United States under the conditions hereof to maintain any bridge or bridges situated on such part thereof so reverting to the City shall thereupon terminate, but any such reverter shall leave unaffected whatever right, title or interest the United States may have or acquire in or to the premises described herein other than by virtue of this ordinance or the conveyance executed in pursance hereof. Should the El Paso County Water Improvement District No. 1 request the execution of a conveyance to the United States in accordance with the terms hereof, the Mayor and City Clerk are hereby authorized to execute and attest the same."

Section 2 The fact that it is immediately necessary to commence work on fencing the right-of-way of the Franklin Canal as a measure of public safety and that this work is awaiting the vesting of title in the

United States of America to the right-of-way aforesaid, creates a great public emergency justifying the suspension of the rule laid down in Section 33 of the Charter of the City of El Paso providing that no ordinance shall be finally adopted until it has been read in regular meeting of the City Council at two regular meetings, and by unanimous vote of the Aldermen present and with the consent of the Mayor, as in this section provided, said rule is suspended and this ordinance shall take effect immediately upon its passage and approval.

Passed and Approved this 9th day of November, A. D. 1939.

J. E. ANDERSON,
Mayor.

Attest:

W. R. COLLINS,
City Clerk.

I hereby certify that the within and foregoing is a true and correct copy of an ordinance amending an ordinance entitled "An Ordinance Conveying unto the United States of America all the Right, Title and interest of the City of El Paso in and to the Right-of-way occupied by the Franklin Canal, etc.," passed and approved the 5th day of September, 1939, and is of record in Minute Book Z-2, Pages 448 and 449, inclusive, of the proceedings of the City Council dated November 9, 1939. Given under my hand and seal of the City of El Paso, Texas this 26th day of November, 1952.

(S.) W. R. COLLINS,
(Seal) City Clerk.

Plaintiff's Exhibit 18, having been received in evidence by the Court, reads in words and figures as follows:

"P-18".

9371.

Quit-Claim Deed.

The State of Texas,
County of El Paso.
Know All Men By These Presents:

That The City of El Paso, a municipal corporation duly organized and existing under the laws of the State of Texas and situated within the County of El Paso and State of Texas, for and in consideration of the benefits derived and to be derived by the said City and all of the residents thereof by the opration and maintenance by the United States of America and its successors and assigns of the Franklin Canal of the Rio Grande Reclamation Project and pursuant to the provisions of that certain act of the 45th Legislature of Texas, Chapter 77, (1937), and ordinance of said City duly enacted and approved on the 9th day of November, 1939, does by these presents Bargain, Sell, Release and Forever Quit-Claim and confirm unto the said United States of America, pursuant to the Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof and supplementary thereto, its successors and assigns, all its right, title and interest in and to that tract or parcel of land lying in the County of El Paso, and State of Texas, described as follows, to-wit:

All parts of streets, alleys and intersections, or any other lands owned by the City of El Paso, within the limits of the following described right-of-way: Beginning at the headgates of said Franklin Canal as constructed in 1914 and enlarged in 1921 by the Bureau of Reclamation; thence to and across the Riverside Drive or Levee Road over land acquired by the United States for the headworks of said canal; thence following along the north or east bank of the Rio Grande over right-of-way acquired by the El Paso Irrigation Company from H. B. Stevens et al., to a point 3,610 feet below the headgates measured on the center line of the canal, being the end of the concrete lined section, 25 feet on each side of the center line of said canal; thence continuing along the north or east bank of the Rio Grande over said acquired right-of-way to Eighth Street 40 feet on each side of the center line of said canal, together with all wasteway or sluiceway channels leading from the canal into the river; thence along Eighth Street to and into property known as the Cotton Estate, a concrete lined section 13 feet on each side of the center line of said canal; thence turning and continuing northeasterly through said Cotton Estate to the intersection of Williams and East San Antonio Streets 50 feet on each side of the center line of said canal; thence along East San Antonio Street over right-of-way acquired by the El Paso Irrigation Company from the Bassett Addition to Piedras Street 35 feet on each side of the center line of said canal; thence continuing along East San Antonio Street and turning into an alley between Rivera Street and East San Antonio Street to Stevens Street over right-of-way acquired by the El Paso Irrigation Company from the East El Paso Addition 25 feet on each side of the center line of said canal;

thence continuing along said alley and turning into Boone Avenue 35 feet on each side of the center line of said canal; thence south along Boone Avenue a distance of approximately 900 feet, and 40 feet on each side of the center line of said canal; thence turning easterly through Washington Park over right-of-way acquired by the El Paso Irrigation Company from J. B. Leahy, and extending on to the city limits, being 40 feet on each side of the center line of said canal; reserving to the said City of El Paso the right to use as a part of the City street system of said city all bridges heretofore constructed by the Bureau of Reclamation of the United States at the points on said canal where the same is intersected by the following described streets, alleys or other crossings: S. Santa Fe St., S. El Paso St., S. Oregon St., S. Mesa Ave, S. Stanton St., S. Kansas St., S. Campbell St., S. Florence St., S. Ochoa St., S. Virginia St, S St. Vrain St., Hills St., Tays St., Park St., Fourth St., First St., Laurel St., Eucalyptus St., Willow St. Foot Bridge, S. Piedras St.; S. Raynor St., S. Estrella St. S. Grama St., S. Stevens St., Hammett Boulevard, Boone Ave., Evergree St. (In Washington Park), Washington Park East Road, Tobin Place, Alley East of Hadlock Place, Francis St., and Verde Ave.; provided, however, and this conveyance is subject to the condition that the United States shall be obligated to maintain the said bridges at the said described crossings contingent, however, upon appropriations being made therefor by Congress; and there is further reserved to the said City of El Paso the right to construct and maintain at its own cost and expense such additional bridges and other structures across said canal other than those hereinabove designated as it may deem necessary.

To Have And To Hold all its right, title, interest, estate and claim in and to the said premises, together with all and singular, the rights, privileges and appurtenances to the same in any manner belonging unto the said United States of America, its successors and assigns, forever; provided, however, that if at any time in the future, the Secretary of the Interior of the United States of America or other duly authorized officer of the United States shall decide that said right-of-way or any part thereof is no longer needed for the operation of said canal or for irrigation purposes, then and in that event whatever rights or title the City of El Paso has by these presents conveyed to the United States as to such part thereof shall thereupon revert to the said City of El Paso and the obligation of the United States under the conditions of this conveyance to maintain any bridge or bridges situated on such part thereof so reverting to the City of El Paso shall thereupon terminate, but any such reverter shall leave unaffected whatever right, title or interest the United States may have or acquire in or to said hereinabove described premises other than by virtue of this conveyance.

In Witness Whereof the said City of El Paso has caused these presents to be executed and subscribed by its Mayor and attested by its Clerk this 9th day of November, A. D. 1939.

THE CITY OF EL PASO.

By (S.) J. E. ANDERSON.

(Seal) Mayor.

Attest:

(S.) W. R. COLLINS,
City Clerk.

The State of Texas,
County of El Paso.

Before Me, a Notary Public in and for El Paso County, Texas, on this day personally appeared J. E. Anderson, Mayor of the City of El Paso, a municipal corporation, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that the same was the Act of the said City of El Paso, a municipal corporation, and that he executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

Given Under My Hand and seal of office, this 9th day of November, A.D., 1939.

(S.) G. R. DANIELS,
(Seal) Notary Public in and for El Paso County, Texas.

Filed for Record Feb. 20, 1940 at 4:15 o'clock P. M. and recorded Feb. 23, 1940 at 8:26 o'clock A. M.

P. D. LOWRY,
County Clerk.
By (S.) W. T. DUNCAN,
Deputy.

The State of Texas,
County of El Paso.

I, Raymond L. Telles, Jr., County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the Q. C. Deed from the City of El Paso to United States of America Dated the 9 day of November 1939, as the same appears of record in the Deed Records of said County in Volume 660 page 399 thereof.

Given under my hand and seal of office, at office, in El Paso, Texas, this the 9 day Dec. A. D. 1952.

RAYMOND L. TELLES, JR.,
County Clerk,
By (S.) EMILIE G. MORROW,
Deputy.

* * * * * * * *

Plaintiff's Exhibit 19, having been received in evidence by the Court, reads in words and figures as follows:

"P-19".

In the District Court of El Paso County, Texas, Forty First Judicial District.

Francisco Mendoza, Plaintiff,
vs. No. 53430
The City of El Paso, Texas, Defendant.

To the Honorable Judge of said Court:

Now Comes Francisco Mendoza, who resides in El Paso County, Texas, hereinafter called Plaintiff, ap-

pearing herein individually and also for the use and benefit of his wife, Luz Mendoza, complaining of the City of El Paso, Texas, an incorporated city, and municipality in the State of Texas, and situated in El Paso County, Texas, hereinafter called Defendant, and for cause of action, said Plaintiff represents to the Court the following:

I.

That on or about June 9, 1943, and for many years prior thereto, that the Defendant was, and still is at the present time, an incorporated city and municipality of the State of Texas, having a special charter of corporation, and being governed by a mayor and board of aldermen, constituting a city council for said city; that J. E. Anderson is the present mayor of said city, and W. R. Collins is at present the City Clerk of said City, and that service of process herein may be had upon the city of El Paso, by serving the City Mayor and the city clerk, each in the capacity aforesaid.

II.

That Plaintiff, Francisco Mendoza, was the father of Lionides Mendoza, who was a minor, and who was about twelve (12) years of age, at the time of the occurrence hereinafter set out, and that the said Francisco Mendoza is suing herein, individually and for himself and in behalf of his wife, Luz Mendoza.

III.

That long prior to the occurrence hereinafter set out, the Defendant had exclusive control, possession and use of the streets in the City of El Paso, Texas,

and especially Park Street, in said city; that said Park Street was a public thoroughfare in said city, running in a Northerly and Southerly direction across the Southern Portion of the City of El Paso, Texas, and intersects with and crosses what was known as an irrigation canal and formerly known as Franklin Irrigation Canal, and at the point where said Park Street crosses said canal the City of El Paso, Texas, at the time of the occurrence hereinafter set out, was maintaining a bridge across said Franklin Irrigation Canal on said Park Street, and became the intersection of Park Street, Eighth Street and the Franklin Canal.

Plaintiff further states that in June, 1943, the City of El Paso, Texas, acting by and through its duly constituted and authorized agents, began to re-build, repair or fix said bridge, and while so doing their agents, servants and employees negligently repaired said bridge, negligently and carelessly protected the same, negligently failed to close off said canal and protect the public that customarily used said bridge, while said bridge was being repaired; that the servants, agents and employees of the said City of El Paso, while repairing said bridge, negligently and carelessly left two boards, or timbers, about the center of said bridge, extending Northerly and Southerly across said canal, and thus negligently invited the public to use said crossing to go to and from one side of said canal to the other, and across said canal; that there were no lights placed on said temporary and dangerous crossing and no guards nor warning given to those that might attempt to use said negligently constructed temporary crossing; and that Plaintiff's son, twelve (12) years old, about eight (8)

o'clock at night, on June 9, 1943, attempted to cross said canal on Park Street, and used the negligently constructed, temporary bridge, made of two boards or timbers, and that said son fell from said negligently constructed temporary bridge, made of two boards or timbers, and was drowned.

IV.

Plaintiff says that at the time of his son's death, that the Defendant, its agents, servants and employees, acting in the course of their employment, left said temporary crossing of two boards, or timbers, across said canal and that by the placing of said two board or timbers across said canal, the Defendant, acting by and through its agents, servants and employees, invited the public, and especially this Plaintiff's minor son, to use the said temporary crossing; and said crossing was negligently constructed and negligently maintained, and said temporary bridge or crossing was dangerous to any one and especially a child; that the Defendant, its agents, servants and employees, acting in the course of their employment as aforesaid, knew, or should have known with the use of ordinary care, that said temporary bridge or crossing, was dangerous.

That in accordance to the invitation to the public to use said temporary crossing, Plaintiff's son attempted to cross said negligently constructed temporary bridge, and that, neither Plaintiff, nor his said son had knowledge of the fact that said bridge was dangerous, but that Plaintiff's said son did believe, and had a right to believe that those in charge of the repair and construction of said bridge across said

canal on said Park Street was safe, and that proper safe-guards had been made for him, and others who might have occasion to use said temporary dangerous bridge, or crossing.

V.

That Plaintiff's son, while attempting to cross said temporary bridge, so negligently constructed, so negligently unprotected, fell into said canal and lost his life; that prior to the death of Plaintiff's son, Lionides Rodolfo Mendoza, was an intelligent, alert and industrious boy, and had he lived would have had a large earning capacity, and would have earned large sums of money, and that by virtue of the premises the said Plaintiff, Francisco Mendoza, who is suing herein in his own behalf, and in behalf of his wife, Luz Mendoza, has been damaged in the sum of Fifteen Thousand and no/100 ($15,000.00) Dollars.

VI.

That prior to his death, the said Lionides Rodolfo Mendoza, was in good health, a normally strong and active boy; that he was loving, affectionate and a dutiful son, and had at all times been a companion to his father and mother, and rendered services to them, and worked for them and made other contributions to them of a pecuniary value; that on account of the untimely death of said Lionides Rodolfo Mendoza, on account of the Defendant's negligence, the Plaintiff has been compelled to expend Two Hundred ($200.00) Dollars, as funeral expenses, which amount is reasonable, usual and customary therefor.

VII

That the negligence, carelessness and recklessness of the Defendant's agents, servants and employees, which proximately caused, or contributed to the cause of the death of the said Lionides Rodolfo Mendoza, and the damages sustained by the said Francisco Mendoza and his wife, Luz Mendoza, consisted of tne following:

a. That the Defendant, its agents, servants and employees, failed to take any precautions whatsoever to protect Plaintiff's son and the general public from using, or attempting to use the crossing over said canal at Park Street with the negligently improvised bridge.

b. That the Defendant, its agents, servants and employees failed to take any other precautions regarding barriers to prevent the general public, and especially this Plaintiff's son, from going about, or near said crossing while it was being re-built, repaired or replaced.

c. That the Defendant, its agents, servants and employees, failed to take any precaution in fencing off and preventing the public, and especially Plaintiff's son, from crossing said canal on Park Street at the time and during the repairing of said bridge.

d. That the Defendant, its agents, servants and employees should have known that to leave said improvised crossing of two board or timbers across said canal was a dangerous situation, and that if same was not protected and fenced off, or due warn-

ing given, that the Public generally, and especially Plaintiff's son, would probably attempt to use the same, and would probably be injured and damaged, as said crossing was known to the said Defendant, its agents, servants and employees, to be unsafe and dangerous.

e. Nevertheless, the Defendant, its agents, servants and employees, left said crossing in such a condition as would invite the public, and especially Plaintiff's son, to use same, and hold out to the public, and to this Plaintiff's son, that it was safe for them to use said improvised crossing.

f. That the Plaintiff in due time applied to the city council of the City of El Paso, Texas, the Defendant herein, for redress, satisfaction and compensation or relief, by written application, and that such was done prior to the filing of Plaintiff's Original Petition herein, but the said Defendant, acting through its City Council aforesaid, refused to pay the claim of Plaintiff, or any part thereof.

Wherefore, Plaintiff Prays the Court that the Defendant be cited to appear and answer this Petition, and that he have judgment in his individual capacity and on behalf of Luz Mendoza, his wife, for the sum of Fifteen Thousand and no 100 ($15,000.00) Dollars, actual damages, and for costs of suit, and for such other and further relief, special and general, in law and in equity, to which he may be justly entitled, by virtue of the premises and in the capacity set out herein.

HOLLIDAY AND SIMS.
By (S.) ROBERT HOLLIDAY.
Attorneys for Plaintiff.

Indorsed: No. 53430—In the District Court of El Paso County, Texas, Forty First Judicial District—Francisco Mendoza, Plaintiff, vs. The City of El Paso, Texas, Defendant—Plaintiff's Original Petition —Filed: July 26th A. D. 1943 at ... o'clock ...M—J. C. Orgain, Clerk, District Courts, El Paso County, Texas, By Dorothy S. Merrill.

In the District Court of El Paso County, Texas, Forty First Judicial District.

Francisco Mendoza, Plaintiff,
vs. No. 53430.
The City of El Paso, Texas, Defendant.

To the Honorable Judge of said Court:

Comes Now, the City of El Paso, Texas and moves the Court to abate this cause of action against the City of El Paso for the following reasons, to-wit:

That on August 31, 1939, the City of El Paso by Deed of that date, sold to the United States of America, the land described in said Deed, same being as follows:

Quit-Claim Deed.

The State of Texas,
County of El Paso.

Know All Men By These Presents: That The City of El Paso, a municipal corporation duly organized and existing under the laws of the State of Texas and situated within the County of El Paso and State of Texas, for and in consideration of the benefits derived and to be derived by the said City and all of

the residents thereof by the operation and maintenance by the United States of America and its successors and assigns of the Franklin Canal of the Rio Grande Reclamation Project and pursuant to the provisions of that certain act of the 45th Legislature of Texas, Chapter 77, (1937) and ordinance of said City duly enacted and approved on the 5th day of September, 1939, does by these presents, Bargain, Sell, Release and Forever Quit-Claim and confirm unto the said United States of America, pursuant to the Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof and supplementary thereto, its successors and assigns, all its right, title and interest in and to that tract or parcel of land lying in the County of El Paso, and State of Texas, described as follows, to-wit:

All parts of streets, alleys and intersections, or any other lands owned by the City of El Paso, within the limits of following described right-of-way: Beginning at the headgates of said Franklin Canal as constructed in 1914 and enlarged in 1921 by the Bureau of Reclamaton; thence to and across the Riverside Drive or Levee Road over land acquired by the United States for the headworks of said canal; thence following along the north or east bank of the Rio Grande over right-of-way acquired by the El Paso Irrigation Company from H. B. Stevens et al., to a point 3,610 feet below the headgates measured on the center line of the canal, being the end of the concrete lined section, 25 feet on each side of the center line of said canal; thence continuing along the north or east bank of the Rio Grande over said acquired right-of-way to Eighth Street 40 feet on each side of the center line of said canal; together with all wasteway or sluiceway channels leading from the canal into the river; thence

along Eighth Street to and into property known as the Cotton Estate, a concrete lined section 13 feet on each side of the center line of said canal; thence turning and continuing northeasterly through said Cotton Estate to the intersection of Williams and East San Antonio Streets 50 feet on each side of the center line of said canal; thence along East San Antonio Street over right-of-way acquired by the El Paso Irrigation Company from the Bassett Addition to Piedras Street 35 feet on each side of the center line of said canal; thence continuing along East San Antonio Street and turning into an alley between Rivera Street and East San Antonio Street to Stevens Street over right-of-way acquired by the El Paso Irrigation Company from the East El Paso Addition 35 feet on each side of the center line of said canal; thence continuing along said alley and turning into Boone Avenue 35 feet on each side of the center line of said canal; thence south along Boone Avenue a distance of approximatly 900 feet, and 40 feet on each side of the center line of said canal; thence turning easterly through Washington Park over right-of-way acquired by the El Paso Irrigation Company from J. B. Leahy, and extending on to the city limits, being 40 feet on each side of the center line of said canal; reserving to the said City of El Paso the right to use a part of the City street system of said city all bridges heretofore constructed by the Bureau of Reclamation of the United States at the points on said canal where the same is intersected by the following described streets alleys or other crossings: S. Santa Fe St., S. El Paso St., S. Oregon St., S. Mesa Ave., S. Stanton St., S. Kansas St., S. Campbell St., S. Florence St., S. Ochoa St., S. Virginia St., S. St. Vrain St., Hills St., Tays St., Park St., Fourth St., First St., Laurel

St., Eucalyptus St., Willow St., Foot Bridge, S. Piedras St., S. Raynor St., S. Estrella St., S. Grama St., S. Stevens St., Hammett Boulevard, Boone Ave., Evergreen St., (In Washington Park), Washington Park East Road, Tobin Place, Alley East of Hadlock Place, Francis St., and Verde Ave.; provided, however, and this conveyance is subject to the condition that the United States shall be obligated to maintain the said bridges at the said described crossings, and there is further reserved to the said City of El Paso the right to construct and maintain at its own cost and expense such additional bridges and other structures across said canal other than those hereinabove designated as it may deem necessary.

To Have and To Hold all its right, title, interest, estate and claim in and to the said premises, together with all and singular, the rights, privileges and appurtenances to the same in any manner belonging unto the said United States of America, its successors and assigns, forever; provided, however, that if at any time in the future, the Secretary of the Interior of the United States of America or other duly authorized officer of the United States shall decide that said right-of-way or any part thereof is no longer needed for the operation of said canal or for irrigation purposes, then and in that event whatever rights or title the City of El Paso has by these presents conveyed to the United States as to such part thereof shall thereupon revert to the said City of El Paso and the obligation of the United States under the conditions of this conveyance to maintain any bridges situated on such part thereof so reverting to the city of El Paso shall thereupon terminate, but any such reverter shall leave unaffected whatever right, title or inter-

est the United States may have or acquire in or to said hereinabove described premises other than by virtue of this conveyance.

In Witness Whereof the said City of El Paso has caused these presents to be executed and subscribed by its Mayor and attested by its Clerk this 5th day of September, A. D. 1939.

THE CITY OF EL PASO,
By J. E. ANDERSON,
Mayor.

Attest:
W. R. COLLINS,
City Clerk.

Said deed was authorized by the City Council at a regular session at which a quorum was present, by an Ordinance entitled "An Ordinance Conveying unto the United States of America all the right, title and interest of the City of El Paso in and to the right-of-way occupied by the Franklin Canal over, along and across all streets, alleys and other public lands of the City of El Paso, with certain reservations and providing for a reverter when the said right-of-way is no longer used for canal purposes, and declaring an emergency," said Ordinance having been passed and approved on the 5th day of September, 1939, and containing an emergency clause.

Section 2. That reservations in said Deed were that it was to revert to the City of El Paso at any time in the future that the Secretary of the Interior of the United States, or other duly authorized officer of the

United States, shall decide that said right-of-way, or any part thereof is no longer needed for the operation of said canal for irrigation purposes, which have not yet occurred.

Section 3. That the property described therein includes that part of Park Street in the City of El Paso wherein it is alleged in Plaintiff's petition that Plaintiff's son fell through a bridge which was being reconstructed by the United States of America.

Section 4. That said Ordinance was passed by virtue of the authority vested in the City of El Paso by Section 5244-A of the Revised Statutes of the State of Texas and by virtue of Section 56 of the City Charter of the City of El Paso, Texas, which Charter was approved in 1917 by a vote of the people of the City of El Paso, Texas, as well as by various prior elections in the City of El Paso.

Section 5. That by virtue of said Deed and the act of the City Council of the City of El Paso, and by virtue of the authority vested in it by law, the City of El Paso has no further control over said place alleged in Plaintiff's petition where said Plaintiff's son was alleged to have been injured and, therefore, is not liable in this case and said case should be abated as to the City of El Paso.

Section 6. In the alternative, this Defendant says that if it is mistaken in its allegations in this plea and abatement as to any right that defendant has to contract with the United States of America to sell said property, then this Defendant alleges that in said Deed to the United States the United States agreed to

maintain any bridge or bridges situated on such part of said property conveyed to the United States including the bridge across the Franklin Canal wherein it was alleged Plaintiff's son was injured, and that the City of El Paso under any circumstances had the right to contract with any other person to maintain such bridge or bridges, and that the City of El Paso had the right to contract to maintain said bridge and the United States became and was an independent contractor carrying out its contract with the City of El Paso, and the City of El Paso had no right or authority to direct the manner and means in which said work was being done.

Wherefore, the premises considered, this Defendant prays that said case be abated as to this Defendant.

(Sgd.) R. F. MOMSEN,
(Sgd.) E. F. CAMERON,
Attorneys for the City of El Paso, Texas.

State of Texas,
County of El Paso.

E. F. Cameron, being duly sworn, makes oath and says that he is one of the Attorneys of record for the above named defendant, the City of El Paso, and makes this affidavit for it on its behalf and says that the facts stated in the above and foregoing plea and abatement are true.

(Sgd.) E. F. CAMERON.

Subscribed and Sworn to before me this 3rd day of August, 1943.

(Sgd.) E. J. KASTL.
(E. J. Kastl),
(Seal) Notary Public in and for El Paso, Texas.

Further answering, if need be and only in case the plea and abatement is overruled, this Defendant in answer to Plaintiff's petition herein says:

1. Defendant denies each and all the allegations in Plaintiff's petition contained, and says that they are not true in whole nor in part, and of this it puts itself upon the country.

Wherefore, said Defendant having fully answered, prays to be discharged with its cost.

2. Further answering if need be, this Defendant says that on the 9th day of June, 1943, when the Plaintiff's son is alleged to have been drowned by attempting to cross the bridge over the Franklin Canal at Park Street in El Paso, Texas, that said bridge was in the process of reconstruction, that barricades were placed on either side of said bridge and four lights were placed thereon to notify people not to cross, and that it was negligence on behalf of the Plaintiff to permit a twelve-year old son to be around and play around said bridge when it was being reconstructed and when notice was given to the public by the lights and barricade, and that said negligence on behalf of the Plaintiff in permitting said twelve-year old son to play around said bridge was negligence which contributed directly to the injury received by said twelve-year old boy, and, therefore, said Plaintiff was guilty of contributory negligence in so doing.

3. Defendant further says that on the 5th day of September, 1939, the City of El Paso conveyed to the United States of America by Deed of that date, cer-

tain lands in the City of El Paso, Texas, a copy of said Deed being as follows, to-wit:

"Quit-Claim Deed

The State of Texas.
County of El Paso.

Know All Men By These Presents That

The City of El Paso, a municipal corporation duly organized and existing under the laws of the States of Texas and situated within the County of El Paso and States of Texas, for and in consideration of the benefits derived and to be derived by the said City and all of the residents thereof by the operation and maintenance by the United States of America and its successors and assigns of the Franklin Canal of the Rio Grande Reclamation Project and pursuant to the provisions of that certain act of the 45th Legislature of Texas, Chapter 77, (1937) and ordinance of said City duly enacted and approved on the 5th day of September, 1939, does by these presents, Bargain, Sell, Release and Forever Quit Claim And confirm unto the said United States of America, pursuant to the Act of June 17, 1902 (32 Stat., 388) and acts amendatory thereof and supplementary thereto, its successors and assigns, all its right, title and interest in and to that tract or parcel of land lying in the County of El Paso, and State of Texas, described as follows, to-wit:

All parts of streets, alleys and intersections, or any other lands owned by the City of El Paso, within the limits of the following described right-of-way: Begin-

ning at the headgates of said Franklin Canal as constructed in 1914 and enlarged in 1921 by the Bureau of Reclamation, thence to and across the Riverside Drive or Levee Road over land acquired by the United States for the headworks of said canal; thence following along the north or east bank of the Rio Grande over right-of-way acquired by the El Paso Irrigation Company from H. B. Stevens et al., to a point 3,610 feet below the headgates measured on the center line of the canal, being the end of the concrete lined section, 25 feet on each side of the center line of said canal; thence continuing along the north or east bank of the Rio Grande over said acquired right-of-way to Eighth Street 40 feet on each side of the center line of said canal; together with all wasteway or sluiceway channels leading from the canal into the river; thence along Eighth Street to and into property known as the Cotton Estate, a concrete lined section 13 feet on each side of the center line of said canal; thence turning and continuing northasterly through said Cotton Estate to the intersection of Williams and East San Antonio Streets 50 feet on each side of the center line of said canal; thence along East San Antonio Street over right-of-way acquired by the El Paso Irrigation Company from the Bassett Addition to Piedras Street 35 feet on each side of the center line of said canal; thence continuing along East San Antonio Street and turning into an alley between Rivera Street and East San Antonio Street to Stevens Street over right-of-way acquired by the El Paso Irrigation Company from the East El Paso Addition 35 feet on each side of the center line of said canal; thence continuing along said alley and turning into Boone Avenue 35 feet on each side of the center line of said canal; thence south along Boone Avenue a distance of

approximately 900 feet; and 40 feet on each side of the center line of said canal; thence, turning easterly through Washington Park over right-of-way acquired by the El Paso Irrigation Company from J. B. Leahy, and extending on to the city limits, being 40 feet on each side of the center line of said canal; reserving to the said City of El Paso the right to use a part of the City street system of said city all bridges heretofore constructed by the Bureau of Reclamation of the United States at the points on said canal where the same is intersected by the following described streets, alleys or other crossings: S. Santa Fe St., S. El Paso St., S. Oregon Street, S. Mesa Ave., S. Stanton St., S. Kansas St., S. Campbell St., S. Florence St., S. Ochoa St., S. Virginia St., S St. Vrain St., Hills St., Tays St., Park St., Fourth St., First St., Laurel St., Eucalyptus St., Willow St., Foot bridge, S. Piedras St., S. Raynor St., S. Estrella St., S. Grama St., S. Stevens St., Hammett Boulevard, Boone Ave., Evergreen St., (In Washington Park), Washington Park East Road, Tobin Place, Alley East of Hadlock Place, Francis St., and Verde Ave.; provided, however, and this conveyance is subject to the condition that the United States shall be obligated to maintain the said bridges at the said described crossings, and there is further reserved to the said City of El Paso the right to construct and maintain at its own cost and expense such additional bridges and other structures across said canal other than those hereinabove dsignated as it may deem necessary.

To Have and To Hold all its right, title, interest, estate and claim in and to the said premises, together with all and singular, the rights, privileges and appurtenances to the same in any manner be-

longing unto the said United States of America, its successors and assigns, forever; provided, however, that if at any time in the future, the Secretary of the Interior of the United States of America or other duly authorized officer of the United States shall decide that said right-of-way or any part thereof is no longer needed for the operation of said canal or for irrigation purposes, then and in that event whatever rights or title the City of El Paso has by these presents conveyed to the United States as to such part thereof shall thereupon revert to the said City of El Paso and the obligation of the United States under the conditions of this conveyance to maintain any bridge or bridges situated on such part thereof so reverting to the City of El Paso shall thereupon terminate, but any such reverter shall leave unaffected whatever right, title or interest the United States may have or acquire in or to said hereinabove described premises other than by virtue of this conveyance.

In Witness Whereof the said City of El Paso has caused these presents to be executed and subscribed by its Mayor and attested by its Clerk this 5th day of September, A. D. 1939."

THE CITY OF EL PASO.
By J. E. ANDERSON,
Mayor.

Attest:
W. R. COLLINS,
City Clerk.

That a part of said land was the bridge at Park Street over the Franklin Canal and the said Defend-

ant parted with all its right and interest therein subject only to certain reverters provided in said Deed. That the Defendant, therefore, had no right to repair said bridge and was, herefore, not guilty of any negligence, if any existed in the repairing of said bridge by the United States of America.

That said Deed was passed by virtue of an Ordinance dated September 5, 1939, duly passed by the City Council of the City of El Paso at a regular session, and approved by the Mayor, which ordinance was entitled "An Ordinance Conveying unto the United States of America all the right, title and interest of the City of El Paso in and to the right-of-way occupied by the Franklin Canal over, along and across all streets, alleys and other public lands of the City of El Paso, with certain reservations and providing for a reverter when the said right-of-way is no longer used for canal purposes, and declaring an emergency". That said Ordinance was passed by virtue of the provisions of Section 5244-a of the Revised Statutes of the State of Texas and by virtue of Section 56 of the City Charter of the City of El Paso, Texas, which Charter was approved in 1917 by a vote of the people of the city of El Paso, Texas, as well as by various prior elections in the City of El Paso.

In the alternative this Defendant says that if for any reason the City of El Paso had no right to convey this property, and the City alleges it did have, then this Defendant says that, by virtue of the Deed above-mentioned, the United States contracted with the City of El Paso to maintain a bridge or bridges situated on any part of said Franklin Canal and the bridge in

question at Park Street was one of the bridges contracted between said United States to maintain and keep in repair, and this Defendant alleges that the said City of El Paso had the legal right to contract with any contractor to repair streets and bridges and that the said United States of America was under any circumstances an independent Contractor and was in the act of repairing same at the time it is alleged that Plaintiff's son was injured, and the City of El Paso under any circumstances was only interested in the final completion and repair of said bridge and had no right to dictate the manner and means by which it was done, and is, therefore, not liable in this case to the Plaintiff.

Wherefore, the premises considered, Defendant prays to be discharged with its cost.

(Sgd.) R. F. MOMSEN,
(Sgd.) E. F. CAMERON,
(E. F. Cameron),
Attorneys for Defendant.

Indorsed: No. 53430 in the District Court of El Paso County, Texas, Forty-First Judicial District. Francisco Mendoza, Plaintiff, vs The City of El Paso, Texas, Defendant. Defendant's Plea in Abatement and Answer. Filed Aug. 3, A. D. 1943, at 4:45 o'clock P.M. J. C. Orgain, Clerk, District Courts, El Paso County, Texas, by (Sgd.) Dorothy S. Merrill, Deputy.

In the District Court of El Paso County, Texas. Forty First Judicial District.

Francisco Mendoza, Plaintiff,
vs. No. 73430
City of El Paso, Texas, Defendant.

Plea in Abatement and First Amended Original Answer.

Now Comes Defendant and says that plaintiff has no right to maintain this suit and the same should be abated for the following reasons:

(1) On the 2nd day of June, 1938, the City Council of the City of El Paso passed an Ordinance entitled "An Ordinance Prescribing Conditions Precedent to the Maintenance of Suit Against the City of El Paso, Texas, upon a Cause of Action or Claim for Personal Injuries Suffered, and Declaring an Emergency", and reading as follows:

"Be it Ordained by the City Council of the City of El Paso, Texas:

Section 1. The City of El Paso, Texas, shall not be liable to any person for injuries suffered to his person or the person of another unless the injured person, or some one on his behalf, shall within thirty (30) days from the date the injury was received give notice in writing to the Mayor of the City of El Paso, Texas, of the following facts:

a. The date and time when the injury occurred and the place where the injured person was at the time the injury was received.

b. The nature and extent of the injury together with a specific and detailed statement of how and under what circumstances the injury occurred.

c. The names of all the persons who according to the knowledge or information of the injured person witnessed the happening of the injury or any part thereof and the name of the doctor or doctors, if any, to whose care the injured person is committed.

Section 2. The written notice and statement required under Section 1 above shall be sworn to by the injured person or by someone on his behalf who is authorized so to do by the injured party.

Section 3. All persons who before the effective date of this ordinance shall have a cause of action against the City of El Paso, Texas, for personal injuries and who have not previously filed suit shall have thirty (30) days from the effective date hereof to comply with the terms of this ordinance.

Section 4. This ordinance shall not apply to any cause of action on which suit has been filed against the City of El Paso, Texas, prior to the effective date hereof.

Section 5. The validity of any section or any part thereof of this ordinance shall not be dependent upon any other section or part thereof. If any section or part thereof shall, for any reason, be held unconstitutional or invalid, such decision shall not affect the validity of any of the remaining sections or parts thereof, and it is hereby expressly declared that the foregoing sections are separable.

The fact that there is no adequate law to protect the City of El Paso from suits which may be brought against it long after the alleged occurrence of acts of said City, and to regulate the bringing of suits against it creates an emergency and an imperative public necessity, and by unanimous vote of the Aldermen present, and with the consent of the Mayor, Section 33 of the Charter requiring the reading of ordinances at two regular meetings is hereby suspended and this ordinance shall take effect upon its passage and approval.

Passed and Approved this 2nd day of June, A. D. 1938".

(S.) M. A. HARLAN.
Mayor.

Attest:
W. R. COLLINS.
City Clerk.

Said Ordinance was on said date approved by the Mayor of said City, was on June 4, 1938, duly published in the Herald-Post, a newspaper of general circulation of said City, is of record in Minute Book Y-2, Page 426, and is now, and was at all times material to this case, in force and effect.

(2) The notice required by the foregoing ordinance has not been given by plaintiff or by any other person. Plaintiff's attorney did, on or about June 28, 1943, deliver to the said Mayor and Council a notice which, however, was defective and insufficient in the following particulars:

Said notice failed to give a specific and detailed statement of how, and under what circumstances, the injury occurred; said notice failed to give the names of all persons who, according to the knowledge or information of the injured person, witnessed the happening of the injury or any part thereof; and the name of the doctor or doctors, if any, to whose care the injured person was committed; and said notice was not sworn to.

Wherefore, Defendant prays that this action be abated.

TRAVIS WHITE,
City Attorney,
R. F. MOMSEN,
Ass't. City Attorney,
By (Sgd.) TRAVIS WHITE,
Counsel for Defendant.

The State of Texas,
County of El Paso.

Before Me, the undersigned authority, this day personally appeared Travis White, whose name is signed to the foregoing writing and made oath before me in my County aforesaid, that he is one of the attorneys of record for the above-named defendant, and makes this affidavit in its behalf, and that the matters and things set forth in the foregoing plea in abatement are true.

Given Under My Hand and Official Seal this 13th day of September, 1944.

(Sgd.) CLARA D. McKIE,
(Clara D. McKie),
(Seal) Notary Public in and for El Paso County, Texas.

Now Comes Defendant, and files this its First Amended Original Answer in Lieu of its Original Answer heretofore filed in this cause.

I.

Defendant denies each and all of the allegations in plaintiff's petition contained, and says that they are not true in whole or in part, and of this it puts itself upon the country.

II.

Further answering, if need be, and not waiving the foregoing general denial, defendant pleads in bar of this action the failure to give notice of the claim asserted, as more fully set forth in the Plea in abatement filed herewith, the allegations of which pleading are hereby adopted by reference, and made a part of this answer.

III.

Further answering, if need be, and not waiving the foregoing general denial, defendant says that long prior to the acts complained of in plaintiff's petition, defendant conveyed to the United States certain lands, including the bridge described in plaintiff's petition, a copy of which conveyance, marked "Exhibit A", is hereto attached and made a part of this Answer; that said conveyance was executed by authority of an ordinance duly passed by the City Council of the City of El Paso and approved by the Mayor, a copy of which ordinance, marked "Exhibit B" is attached hereto and made a part of this Answer; that title to

and possession and control of said lands, and particularly said bridge, are, and have been since the execution and delivery of said deed, in the United States of America; that defendant is under no duty, and has no right or power, to maintain or repair said bridge or perform any acts in connection therewith; that the acts complained of in plaintiff's petition, if any such were done, were not the acts of this defendant but of the United States, its agents, servants, and employees, and this defendant had no control over the same, and no right to direct or interfere therewith, and no responsibility therefor.

IV.

Not waiving the foregoing general denial, defendant further says that notice and warning that said bridge was under repair and might be unsafe, if such was the fact, was given by the erection of barricades and the placing of lights at and near said bridge, and that the condition of said bridge was visible and obvious, and that Plaintiffs in the exercise of ordinary care should have known and did know of the condition of said bridge, and in the exercise of ordinary care should not have allowed their son to go near or upon said bridge or to cross the same, and should have warned, instructed and prevented their said son from so doing; but plaintiffs negligently allowed their son to go near, upon and across said bridge, and negligently failed to warn, instruct and prevent their son from so doing; and such negligence of plaintiffs proximately caused and contributed to cause the injury and damage complained of.

V.

Not waiving the foregoing general denial, defendant further says that notice and warning that said bridge was under repair and might be unsafe, if such was the fact, was given by the erection of barricades and the placing of lights at and near said bridge, and that the condition of said bridge was visible and obvious, and that said decedent, Lionides Mendoza, in the exercise of ordinary care suited to his years, should have known and did know of the condition of said bridge, and was capable of comprehending, and did comprehend, the danger incident thereto, if any such existed; and in the exercise of ordinary care suited to his years, should not have gone near or upon said bridge and should not have attempted to cross the same; but said Lionides Mendoza negligently went near, upon and across said bridge, and such negligence of said Lionides Mendoza proximately caused and contributed to cause the injury and damage complained of.

VI.

Not waiving the foregoing general denial, defendant further says that, the conditions being as described in paragraph V hereof, said Lionides Mendoza went near and upon said bridge, and leaned out and over the waters of the canal over which said bridge is located, and attempted to reach for some object in said waters, and thereby, fell into said canal; that said Lionides Mendoza was capable of comprehending and did comprehend, the dangers incident to said acts, and in the exercise of ordinary care suited to his years, should not have leaned out

and over said waters and should not have attempted to reach for such object; and such negligence of said Lionides Mendoza proximately caused and contributed to cause the injury and damage complained of.

VII.

Not waiving the foregoing general denial, defendant further says that at the time said Lionides Mendoza fell into said canal, he was not travelling on any street, highway or bridge, and was not using the same for any purpose incidental to the reasonable, proper and customary use thereof, but was engaged in an attempt to reach into the waters of said canal for the purpose of removing an object therefrom, and neither this defendant nor anyone else was under any duty to maintain said street, highway, or bridge in a safe condition for such improper use; and such improper use of said street, highway, and bridge proximately caused and contributed to cause the injury and damage complained of.

VIII.

Wherefore, having fully answered, defendant prays to be discharged with its cost.

(Sgd.) TRAVIS WHITE,
(Travis White),
City Attorney.
R. F. MOMSEN,
Ass't. City Attorney.
Counsel for Defendant.

I certify that I have delivered a copy of the foregoing pleading to Messrs. Holliday & Sims, Attys for Plaintiffs, Sept. 13, 1944.

(Sgd.) TRAVIS WHITE.

Exhibit "A".

Quit-Claim Deed.

The State of Texas,
County of El Paso.

Know All Men By These Presents: That:

The City of El Paso, a municipal corporation duly organized and existing under the laws of the State of Texas and situated within the County of El Paso and State of Texas, for and in consideration of the benefits derived and to be derived by the said City and all of the residents thereof by the operation and maintenance by the United States of America and its successors and assigns of the Franklin Canal of the Rio Grande Reclamation Project and pursuant to the provisions of that certain act of the 45th Legislature of Texas, Chapter 77, (1937) and ordinance of said City duly enacted and approved on the 9th day of November, 1939, does by these presents Bargain, Sell, Release and Forever Quit-Claim and confirm unto the said United States of America, pursuant to the Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof and supplementary thereto, its successors and assigns, all its right, title and interest in and to that tract or parcel of land lying in the County of El Paso, and State of Texas, described as follows, to-wit:

All parts of streets, alleys and intersections, or any other lands owned by the City of El Paso, within the limits of the following described right-of-way: Beginning at the headgates of said Franklin Canal as constructed in 1914 and enlarged in 1921 by the Bureau of Reclamation; thence to and across the Riverside Drive or Levee Road over land acquired by the United States for the headworks of said canal; thence following along the north or east bank of the Rio Grande over right-of-way acquired by the El Paso Irrigation Company from H. B. Stevens et al., to a point 3,610 feet below the headgates measured on the center line of the canal being the end of the concrete line section, 25 feet on each side of the center line of said Canal; thence continuing along the north or east bank of the Rio Grande over said acquired right-of-way to Eighth Street 40 feet on each side of the center line of said canal, together with all wasteway or sluiceway channels leading from the canal into the river; thence along Eighth Street to and into property known as the Cotton Estate, a concrete lined section 13 feet on each side of the center line of said canal; thence turning and continuing northeasterly through said Cotton Estate to the intersection of Williams and East San Antonio Streets 50 feet on each side of the center line of said canal; thence along East San Antonio Street over right-of-way acquired by the El Paso Irrigation Company from the Bassett Addition to Piedras Street 35 feet on each side of the center line of said canal; thence continuing along East San Antonio Street and turning into an alley between Rivers Street and East San Antonio Street to Stevens Street over right-of-way acquired by the El Paso Irrigation Company from the East El Paso Addition 35 feet on each side of the center line of said canal; thence continu-

ing along said alley and turning into Boone Avenue 35 feet on each side of the center line of said canal; thence south along Boone Avenue a distance of approximately 900 feet, and 40 feet on each side of the center line of said canal; thence turning easterly through Washington Park over right-of-way acquired by the El Paso Irrigation Company from J. B. Leahy, and extending on to the city limits being 40 feet on each side of the center line of said canal; reserving to the said City of El Paso the right to use as a part of the City street system of said city all bridges heretofore constructed by the Bureau of Reclamation of the United States at the points on said canal where the same is intersected by the following described streets, alleys or other crossings: S. Santa Fe St., S. El Paso St., S. Oregon St., S. Mesa Ave., S. Stanton St., S. Kansas St., S. Campbell St., S. Florence St., S. Ochoa St., S. Virginia St., S. St. Vrain St., Hills St., Tays St., Park St., Fourth St., First St., Laurel St., Eucalyptus St., Willow St. Foot Bridge, S. Piedras St., S. Raynor St., S. Estrella St., S. Grama St., S. Stevens St., Hammett Boulevard, Boone Ave., Evergreen St. (In Washington Park), Washington Park East Road, Tobin Place, Alley East of Hadlock Place, Francis St., and Verde Ave.; provided, however, and this conveyance is subject to the condition that the United States shall be obligated to maintain the said bridges at the said described crossings contingent, however, upon appropriations being made therefor by Congress; and there is further reserved to the said City of El Paso the right to construct and maintain at its own cost and expense such additional bridges and other structures across said canal other than those hereinabove designated as it may deem necessary.

To Have and To Hold all its right, title, interest, estate and claim in and to the said premises, together with all and singular, the rights, privileges and appurtenances to the same in any manner belonging unto the said United States of America, its successors and assigns, forever; provided, however, that if at any time in the future, the Secretary of the Interior of the United States of America or other duly authorized officer of the United States shall decide that said right-of-way or any part thereof is no longer needed for the operation of said canal or for irrigation purposes, then and in that event whatever rights or title the City of El Paso has by these presents conveyed to the United States as to such part thereof shall thereupon revert to the said City of El Paso and the obligation of the United States under the conditions of this conveyance to maintain any bridge or bridges situated on such part thereof so reverting to the City of El Paso shall thereupon terminate, but any such reverter shall leave unaffected whatever right, title or interest the United States may have or acquire in or to said hereinabove described premises other than by virtue of this conveyance.

In Witness Whereof the said City of El Paso has caused these presents to be executed and subscribed by its Mayor and attested by its Clerk this 9th day of November, A. D. 1939.

THE CITY OF EL PASO.
By (S.) J. E. ANDERSON.
Mayor.

Attest:
(S.) W. R. COLLINS.
City Cerk.

Exhibit "B".

An Ordinance amending an Ordinance entitled "An Ordinance conveying unto the United States of America all the right, title and interest of the City of El Paso in and to the right-of-way occupied by the Franklin Canal over, along and across all streets, alleys and other public lands of the City of El Paso, with certain reservations and providing for a reverter when the said right-of-way is no longer used for canal purposes, and declaring an emergency", by inserting therein the clauses "contingent, however, upon appropriations being made therefor by Congress", and declaring an emergency. Be it ordained by the City Council of the City of El Paso, Texas:

Section 1. That Section 1 of that certain ordinance entitled "An Ordinance conveying unto the United States of America all the right, title and interest of the City of El Paso in and to the right-of-way occupied by the Franklin Canal over, along and across all streets, alleys and other public lands of the City of El Paso, with certain reservations and providing for a reverter when the said right-of-way is no longer used for canal purposes, and declaring an emergency", passed and approved the 5th day of September 1939, be and the same is hereby amended so as to hereafter read as follows:

Section 1. In consideration of the very great benefits conferred upon the City and County of El Paso and all of the residents thereof by the maintenance and operation of the Rio Grande Reclamation Project, furnishing water for the irrigation of land in the City and County of El Paso, and the further consideration that the maintenance and operation of what

is known as the Franklin Irrigation Canal is indispensable to the carriage and distribution of said waters for irrigation purposes, and in accordance with that certain Act of the 45th Legislature of Texas, Chapter 77, (1937), the City of El Paso does hereby convey, transfer, quit-claim, relinquish and confirm unto the United States of America all of the right, title and interest of the City of El Paso in and to the right-of-way occupied by the said Franklin Canal and the appurtenances thereto, through the City of El Paso and in the present location thereof, over, along and across all streets, alleys and other public lands of the City of El Paso, continuing and confirming the use of said right-of-way as hereinafter described.

Said right-of-way is described in words and figures as follows, to-wit: All parts of streets, alleys and intersections, or any other lands owned by the City of El Paso, within the limits of the following described right-of-way: Beginning at the headgates of said Franklin Canal as constructed in 1914 and enlarged in 1921 by the Bureau of Reclamation; thence to and across the Riverside Drive or Levee Road over land acquired by the United States for the headworks of said canal; thence following along the north or east bank of the Rio Grande over right-of-way acquired by the El Paso Irrigation Company from H. B. Stevens et al., to a point 3,610 feet below the headgates measured on the center line of the canal, being the end of the concrete lined section, 25 feet on each side of the center line of said canal; thence continuing along the north or east bank of the Rio Grande over said acquired right-of-way to Eighth Street 40 feet on each side of the center line of said canal, together with all wasteway or sluiceway channels lead-

ing from the canal into the river; thence along Eighth Street to and into property known as the Cotton Estate, a concrete lined Section 13 feet on each side of the center line of said canal; thence turning and continuing northeasterly through said Cotton Estate to the intersection of Williams and East San Antonio Streets 50 feet on each side of the center line of said canal; thence along East San Antonio Street over right-of-way acquired by the El Paso Irrigation Company from the Bassett Addition to Piedras Street 35 feet on each side of the center line of said canal; thence continuing along East San Antonio Street and turning into an alley between Rivera Street and East San Antonio Street to Stevens Street over right-of-way acquired by the El Paso Irrigation Company from the East El Paso Addition 35 feet on each side of the center line of said canal; thence continuing along said alley and turning into Boone Avenue 35 feet on each side of the center line of said canal; thence south along Boone Avenue a distance of approximately 900 feet, and 40 feet on each side of the center line of said canal; thence turning easterly through Washington Park over right-of-way acquired by the El Paso Irrigation Company from J. B. Leahy, and extending on to the city limits, being 40 feet on each side of the center line of said canal; provided, however, there is reserved to the City of El Paso the right to use as a part of the City Street system of said City, all bridges heretofore constructed by the Bureau of Reclamation of the United States at the points on said canal where the same is intersected by the following described streets, alleys or other crossings: S. Santa Fe St., S. El Paso St., S. Oregon St., S. Mesa Ave., S. Stanton St., S. Kansas St., S. Campbell St., S. Florence St., S. Oehoa St., S. Vir-

ginia St., S. St. Vrain St., Hills St., Tays St., Park St., Fourth St., First St., Laurel St., Eucalyptus St., Willow St. Foot Bridge, S. Piedras St., S. Raynor St., S. Estrella St., S. Grama St., S. Stevens St., Hammett Boulevard Boone Ave., Evergreen St. (In Washington Park), Washington Park East Road, Tobin Place, Alley East of Hadlock Place, Francis St., and Verde Ave.; provided, however, and this ordinance and the conveyance to be made hereunder are subject to the condition that the United States shall be obligated to maintain the said bridges at the said described crossings, contingent, however, upin appropriations being made therefor by Congress; and there is further reserved to the City of El Paso the right to construct and maintain, at its own cost and expense, such additional bridges and other structures across said canal other than those hereinabove designated as it may deem necessary; provided further that if at any time in the future, the Secretary of the Interior of the United States of America or other duly authorized officer of the United States shall decide that the said right-of-way or any part thereof is no longer needed for the operation of said canal or for irrigation purposes, then and in that event, what ever rights or title the City of El Paso has conveyed hereunder to the United States as to such part thereof shall thereupon revert to the said City of El Paso, and the obligation of the United States under the conditions hereof to maintain any bridge or bridges situated on such part thereof so reverting to the City shall thereupon terminate, but any such reverter shall leave unaffected whatever right, title or interest the United States may have or acquire in or to the premises described herein other than by virtue of this ordinance or the conveyance executed in pursuance hereof. Should the El Paso County Water Improve-

ment District No. 1 request the execution of a conveyance to the United States in accordance with the terms hereof, the Mayor and City Clerk are hereby authorized to execute and attest the same."

Section 2. The fact that it is immediately necessary to commence work on fencing the right-of-way of the Franklin Canal as a measure of public safety and that this work is awaiting the vesting of title in the United States of America to the right-of-way aforesaid, creates a great pubic emergency justifying the suspension of the rule laid down in Section 33 of the Charter of the City of El Paso providing that no ordinance shall be finally adopted until it has been read in regular meeting of the City Council at two regular meetings, and by unanimous vote of the Aldermen present and with the consent of the Mayor, as in this section provided, said rule is suspended and this ordinance shall take effect immediately upon its passage and approval.

Passed and Approved this 9th day of November, A. D. 1939.

(S.) J. E. ANDERSON,
Mayor.

Attest:

(S.) W. R. COLLINS,
City Clerk.

Indorsed: #53430 41st Dist. Court. Francisco Mendoza vs. City of El Paso. Defendant's First Amended Answer. Filed Sept. 13, A. D. 1944, at 11 o'clock A. M. J. C. Orgain, Clerk, District Courts, El Paso County, Texas. By (Sgd.) Victor Apodaca, Deputy.

In the District Court of El Paso County, Texas, Forty-First Judicial District.

Francisco Mendoza, Plaintiff,
vs. No. 53,430.
The City of El Paso, Texas, Defendant.

Plaintiff's First Amended Original Petition.

To the Honorable Judge of said Court:

Now Comes Francisco Mendoza, who resides in El Paso County, Texas, hereinafter called plaintiff, and files this, Plaintiff's First Amended Original Petition, amending and in lieu of Plaintiff's Original Petition herenbefore filed, and complaining of the City of El Paso, Texas, hereinafter called defendant, for cause of action plaintiff represents to the Court:

I.

That plaintiff brings this suit individually in his own behalf, and also for the use and benefit of his wife, Luz Mendoza, for the wrongful death of their son, Lionides Mendoza. Plaintiff and his said wife are the surviving parents of said Lionides Mendoza, who at the time of his death left no child surviving him nor any surviving spouse, the said Lionides Mendoza, at the time of his death, being only about twelve years of age.

II.

That defendant is now, and was at all times material herein, an incorporated city and municipality of the State of Texas, situated in El Paso County, Texas, defendant having a special charter of incorporation

and being a Home Rule city, and being governed by a Mayor and Board of Aldermen constituting a City Council; that J. E. Anderson is the present Mayor of said city, and W. R. Collins is at present the city clerk of said city; and service of process may be had upon defendant by serving said mayor and city clerk, each in the capacity aforesaid.

III.

That long prior to, and at the time of, the occasion of the wrongful death of said Lionides Mendoza, as hereinafter set out, defendant had exclusive control, possession, and use of the public streets in the City of El Paso, Texas, including Park Street, a public way and thoroughfare within said city. That at all times material herein, Park Street was a paved and much used street, bearing a large volume of vehicular and pedestrian traffic, and said Park Street runs and ran in a generally northerly and southerly direction across the southerly portion of the City of El Paso, Texas, and intersected and intersects, and crosses and crossed over an irrigation canal generally known by the name of Franklin Canal. That at all times material herein, a bridge spanned Franklin Canal at its intersection with Park Street, and such bridge formed a part and link of Park Street. And said bridge was used by the public, and had been in use by the public for many years prior to the occurrence herein complained of. Being a part and link of Park Street within the corporate limits of the City of El Paso, it was defendant's duty to maintain said bridge over the Franklin Canal in a reasonably safe condition for public use. But, contrary to the duty to the public, defendant failed to exercise ordinary care to main-

tain said bridge in reasonably safe condition. And on or about the ninth day of June, 1943, said bridge was in a dangerous condition for public use. That such dangerous condition was known to defendant, or could and would have been known to defendant in the exercise of ordinary care. That such dangerous condition had existed for a sufficient length of time to put defendant on notice thereof. And defendant, its officers, agents, servants, and employees had either actual or constructive notice of the dangerous condition of said bridge on June 9, 1943.

IV.

On or about June 9, 1943, the said Lionides Mendoza attempted to cross said bridge, but because of its dangerous condition, fell therefrom into the Franklin Canal and its deep, swift waters, and was drowned. The death of the said Lionides Mendoza and the resulting damages to plaintiff and his said wife were proximately caused by the negligence of defendant, its officers, agents, servants, and employees, in failing to exercise ordinary care to keep said bridge in a reasonably safe condition for public use.

V.

Prior to his death, said Lionides Mendoza was a strong, active, healthy, intelligent, alert, and industrious boy, who performed valuable services for plaintiff and his wife; and had he lived, would have had a large earning capacity, and would have earned large sums of money, and would have rendered valuable services to plaintiff and his wife; and by reason of his death, plaintiff and his wife have been deprived of the earnings and services and contributions which the

said Lionides Mendoza would have rendered them. That had he lived, said Lionides Mendoza, being an affectionate and dutiful son, would have continued to render valuable services and have made contributions to plaintiff and his wife, not only until the time that Lionides Mendoza attained the age of twenty-one years, but thereafter for so long as plaintiff and his wife should live; and thereby plaintiff and his wife have been deprived of the value of the services, earnings, and contributions which their said son would have rendered them for the rest of their natural lives. Plaintiff further shows that by reason of the untimely death of the said Lionides Mendoza, on account of defendant's negligence as aforesaid, plaintiff has been compelled to expend the sum of Two Hundred Dollars ($200.00) as burial and funeral expenses, which amount is reasonable for such services, and the usual and customary amount for same in this community. By reason of the premises, plaintiff and his said wife have sustained damages in the aggregate amount of Fifteen Thousand Dollars ($15.000.00), for which they now sue.

VI.

Plaintiff further alleges that in due time and manner, he notified defendant of the death of his son and filed with defendant his claim for damages; and that defendant refused payment of his claim or any part thereof.

Wherefore defendant having appeared and answered herein and being before the Court, plaintiff prays that he have judgment against defendant for himself and in behalf of his wife, Luz Mendoza, for

the sum of Fifteen Thousand Dollars ($15,000.00) actual damages, and that said sum be apportioned between plaintiff and his said wife in such amounts as to the Court or Jury may seem proper, and for costs of suit and for such other and further relief, special and general, in law and in equity, to which he may be justly entitled.

Second Count.

Now Comes plaintiff, Francisco Mendoza, and for a Second Count against defendant, City of El Paso, alleges the following:

Plaintiff adopts all the allegations contained in his foregoing First Count, and alleges that the following additional facts are true:

I.

That a short time prior to June 9, 1943, defendant City of El Paso undertook to reconstruct or repair the said Franklin Canal bridge, or, in the alternative, defendant caused said bridge to be reconstructed or repaired; and while such reconstruction or repair work was being done by defendant or by its duly authorized agents, servants, and employees, the flooring of said bridge was taken up, leaving no surface upon which the public could cross over, except two narrow planks laid lengthwise across the beams and timbers of said bridge. That such two narrow boards or planks were narrow, and unstable, and insufficient for the public to use in crossing said bridge, and constituted a dangerous hazard to the public generally, and especially to children and infirm or otherwise handicapped members of the public. That on the evening

of June 9, 1943, such dangerous condition obtained at said Franklin Canal bridge; and defendant negligently failed to protect the public customarily using said bridge by providing sufficient barriers, lights, or warning signs to prevent the public, and especially children, from using or attempting to cross said bridge on said two planks. By leaving such planks across said bridge, defendant invited the public to use said crossing and to go from one side of said canal to the other, across said planks; and no watchman was placed on duty by defendant to warn the public to refrain from using said bridge while in such dangerous condition. Such repair or reconstruction work and said plank or board walk across Franklin Canal constituted a dangerous condition and nuisance, especially attractive to children. And at about 8:00 p.m. on said date, plaintiff's little twelve year old boy, Lionides Mendoza, who was inexperienced and of immature judgment, attempted to cross Franklin Canal by walking over the plank or board walk, which was suspended on widely separated timbers remaining in said bridge. While thus attempting to cross over Franklin Canal, plaintiff's little boy fell from the narrow walk-way into the rushing waters below, and was drowned.

II

If it should be found that the reconstruction or repair work being done upon the Franklin Canal bridge was actually being done by an independent contractor with defendant, or by such independent contractor's employees or agents; nevertheless, plaintiff alleges that the very nature of the work contemplated, and which was actually being done, was dangerous in its

nature and hazardous to the travelling public. Defendant knew, or in the exercise of ordinary care, should have known that the work contemplated and being performed was hazardous to the general public using or attempting to use said bridge; and defendant, in the exercise of ordinary care, should have taken proper precautions to protect the public from the hazards to which they were exposed in using the bridge in its dangerous condition. Defendant failed to take such precautions, and failed to supervise said work to see that such precautions were taken.

III.

The negligence, carelessness, and recklessness of defendant and its officers, agents, and employees, acting within the scope of their agency and employment, which proximately caused the death of the said Lionides Mendoza and plaintiff's resulting damages, consisted of the following:

A. Defendant failed to close off said bridge from public use while it was being reconstructed or repaired.

B. Defendant failed to keep in place sufficient barriers to prevent the public, and especially children, from attempting to use said bridge while it was in such dangerous condition.

C. Defendant failed to keep in place adequate warning signs or lights or flares to warn the public, and especially children, of the danger of attempting to cross said bridge in its then dangerous condition.

D. Defendant negligently placed and maintained said plant or board walk-way which was narrow, dangerous, and wholly insufficient, thereby inviting its use by the public generally, and especially children.

E. Defendant failed to have on duty a watchman or guard to prevent the use of said bridge by the public generally and especially children, or to warn them of the danger of using said board or plank walk-way.

F. Defendant failed to construct and maintain railings or other suitable and adequate safeguards along the sides of said board walk-way, to prevent pedestrians using said board-way from falling off same into the waters of the Franklin Canal.

Wherefore, premises considered, plaintiff prays as in his foregoing First Count.

Third Count.

Now Comes, plaintiff, Francisco Mendoza, and for a Third Count adopts all the allegations contained in the foregoing first two counts, and in addition thereto, alleges the folowing:

I.

If it should be found that the reconstruction or repair work being done on said Franklin Canal on the occasion in question was not being performed by defendant or its duly authorized officers, agents, servants, and employees, then, in the alternative, plain-

tiff alleges that such reconstruction or repair work was being performed with the knowledge and consent of defendant by other parties; and that defendant either knew, or in the exercise of ordinary care should have known, of the nuisance and dangerous condition created and left by such other persons; and in any event, the repair of said bridge was being done for the benefit of the defendant and for the use of the general public; and defendant should have supervised said work in the exercise of its governmental functions and should have inspected the progress of said work at reasonable intervals from time to time; to keep said public street and its integral link, consisting of said Franklin Canal bridge, in reasonably safe condition for public use. Such dangerous condition of said bridge hereinbefore described, was known to defendant or its duly authorized officers and agents, or could and would have been known to them in the exercise of ordinary care.

II.

Plaintiff further alleges that the untimely death of his said son was proximately caused by the negligence of the defendant in the following particulars:

A. Defendant knew, or in the exercise of ordinary care should have known, of the dangerous condition and attractive nuisance created and maintained at said public street bridge; and knew or had constructive notice of such conditions for a sufficient period of time to have remedied such defects and dangerous condition; and thereafter, negligently failed to remedy such defects and dangerous condition.

B. Defendant negligently failed to inspect adequately the progress of said reconstruction or repair work at reasonable intervals from time to time; which such inspection would have disclosed to defendant the dangerous condition and attractive nuisance then and there being maintained at said public bridge and street.

C. Defendant failed to supervise said repair work or reconstruction of said Franklin Canal bridge, so as to require the maintenance of safeguards to protect the public.

Wherefore, plaintiff prays as in his foregoing First Count.

ROBERT L. HOLLIDAY &
HAROLD L. SIMS,
(S.) HAROLD L. SIMS,
Attorneys for Plaintiff.

702 El Paso National Bank Bldg.,
El Paso, Texas.

I certify that I have mailed a copy of plaintiff's foregoing First Amended Original Petition to Messrs. Travis White, City Attorney, and R. F. Momsen, Assistant City Attorney, attorneys for defendant, on this 11th day of September, 1944.

(S.) HAROLD L. SIMS,
(Harold L. Sims),
Attorney for Paintiff.

Indorsed: No. 53430—In the District Court of El Paso County, Texas. Forty-first Judicial District—Francisco Mendoza, plaintiff vs. the City of El Paso,

Texas, defendant—Plaintiff's first Amended Original Petition—Filed: September 11, A.D. 1944 at 4:10 o'clock, P.M. J. C. Orgain, Clerk, District Courts, El Paso County, Texas,—By: Blanche Pickett Deputy.

State of Texas,
El Paso County.

I, J. C. Orgain, Clerk of the District Courts in and for El Paso County, Texas, 41st Judicial District, do hereby certify that the above and foregoing is a true and correct copy of the Plaintiff's Original Petition, Defendant's Plea in Abatement and Answer, Defendant's First Amended Answer and Plaintiff's First Amended Original Petition in Cause No. 53430 wherein Francisco Mendoza is Plaintiff and The City of El Paso, Texas is Defendant as the same appears of record and on file in this office.

Given under my hand and seal of said Court, this 9th day of December, A. D. 1953.

J. C. ORGAIN,
Clerk District Court, El Paso County, Texas.
By (S.) WANDA BLALOCK.
Deputy.

The instrument was then marked as "Plaintiff's Exhibit No. 20", and reads in words and figures as follows:

"P-20".

1. This Agreement made this the 17th day of January 1920, by and between the United States of America, acting for this purpose by John Barton Payne, Secretary of the Interior, hereinafter styled the

"Secretary", under the provisions of the Act of Congress approved June 17, 1902; (32 Stat., 388) and acts amendatory thereof and supplemental thereto, hereinafter styled the "Reclamation Law"; the El Paso County Water Improvement District No. 1, a public corporation duly formed under the laws of the State of Texas, with irrigation and drainage powers, having its principal place of business at El Paso, El Paso County, Texas, hereinafter styled the "District"; and the El Paso Valley Water Users' Association, a private corporation, organized under the laws of the State of Arizona and having its principal place of business in the City of El Paso, Texas, hereinafter styled the "Association";

Witnesseth: That—

2. Whereas, the Association executed contract with the United States dated June 27, 1906, whereby that corporation agreed to pay for that part of the cost of the irrigation works of the Rio Grande Project which should be apportioned by the Secretary to the shareholders of the Association, and it is now the desire of the said shareholders that the liens in favor of the Association primarily for the purpose of securing reimbursement to the United States, be released and that the Association be dissolved; and,

3. Whereas, the District desires to cooperate with the United States as anthorized by law and particularly for the construction of drainage works and for the construction of works for the distribution and delivery of water for irrigation purposes to the irrigable lands of the District;

4. Now, Therefore, In consideration of the covenants herein contained, it is agreed between the parties as follows:

5. The United States will expend, in addition to the amount heretofore expended, the sum of One Million Six Hundred Twenty-Four Thousand ($1,624,000) Dollars, or so much thereof as may be necessary, for the improvement, construction and extension of the irrigation system for the storage, distribution and delivery of water to the irrigable district lands and for the construction of drainage works for the restoration and maintenance of the irrigability of district lands, subject always, however, to appropriation therefor being made by Congress. In the improvement and extension of the distribution system, the United States shall use such portions of the systems already in existence as may be utilized to advantage to the extent that the titles to said systems and control thereover may be acquired from the owners thereof for use by the United States. The tentative plan prepared by the United States in connection with this work is as follows:

Distribution Districts.

The enlargement and extension of the following named lateral systems, or districts to provide for the irrigation of the areas shown, respectively:

Name of System	Approximate Area to be Irrigated
Upper Franklin	5300 Acres
Juan d'Herrera	3760 Acres
Jornado	2720 Acres
Socorro	1510 Acres

Name of System	Approximate Area to be Irrigated
Ysla	4450 Acres
San Elizario	6270 Acres
Salatral	3700 Acres
Clint	2420 Acres
Island	9400 Acres
Lower Franklin	6070 Acres
Montoya in Texas	2600 Acres
La Union District in Texas	5600 Acres
Three Saints District in Texas	1000 Acres

The cost of the La Union and Three Saints Districts will include a part of the cost of the Mesilla Diversion Dam, and East and West Side Canal Systems in Mesilla Valley, prorated according to the area irrigated from this source. The work as tentatively laid out is shown on map entitled "El Paso Improvement District No. 1, Proposed Lateral System, dated July 1919, on file in the office of the Project Manager, Rio Grande Project.

It is understood to be the desire of the District that in the expenditure of the Moneys for drainage purposes, the agents of the United States shall avail themselves of all information as to sub-surface formation and other conditions, to be obtained as the work shall progress, to the end that the drainage system may be built in an efficient manner, and that therefore it is not to the interest of the landowners of the district that exact dimensions, alignment or extent of drainage canals and ditches be prescribed in advance of the progress of actual construction work.

There have been prepared by the United States plans and schedules of drainage works which it is planned to construct approximately according to the sub-joined table:

Primary Drains

Drain	Length-Miles	Excavation Cu. Yards
Mesa	23.0	1,100,000
Middle	13.9	655,000
Franklin	12.7	584,000
River	7.0	350,000
San Elizario	8.0	400,000
Island	8.0	320,000
Febens	6.3	240,000
Total Primary	78.9	3,649,000

Secondary Drains

Drain	Length-Miles	Excavation Cu. Yards
Clint Spur	1.1	30,000
Socorro	2.0	80,000
Valley Gate	3.5	140,000
Val Verde	2.5	100,000
Border	5.0	200,000
Fabens	4.5	180,000
Total Secondary	18.6	730,000

Mesilla Valley Drains in Texas

Drain	Length-Miles	Excavation Cu. Yards
Montoya	12.6	404,000
Memexas	6.8	336,143
Vinton	3.6	143,378
Lower West	4.6	240,000
Total in Mesilla	27.6	1,123,521

Total for District 125.1 Miles—4,773,251 Cubic Yards. The bottom width of drains will vary from 24 feet to 10 feet, average approximately 12 feet, with side slopes 1½ : 1, and average cut 10 feet.

Structures will be required approximately as follows:

100 Timber Highway Bridges.

200 Timber Farm Bridges.

200 Metal Flumes.

50 Drain Inlets.

50 Special Structures for Canal, Highway and Railroad Crossings.

6. It is understood that the plans for the drainage work and the construction of the distribution system hereinbefore described in Paragraph 5, are necessarily dependent upon conditions variable and uncertain. Such plans are, therefore, tentative merely, and

to the end that said works may be constructed, operated and maintained so as to attain the best results, it is understood that the United States reserves the right to change any and all of said plans as conditions developing from time to time may justify and render necessary or advisable. No change, however, shall be made which will defeat the general purpose sought to be accomplished, or subvert the general tenor of this contract, but all work done under this contract shall be in accordance with plans and specifications approved by the Chief Engineer of the United States Reclamation Service.

7. The United States will continue the operation and maintenance of the irrigation and drainage system until otherwise provided by contract after a vote by the electorate of the District, or until the payments required by the Reclamation Law are made for the major portion of the irrigable lands of the district, subject however, to appropriation for such maintenance and operation work being made by Congress, and provided always that such operation and maintenance shall be performed only in case the Secretary shall receive satisfactory assurance that lawful assessments and levies are being made or tolls and charges are being imposed, sufficient to meet the expense thereof, and provided further, that full repayment of the cost of the operation and maintenance for previous years shall have been made to the United States. There shall be considered as a part of the operation expense a storage cost of fifty cents per acre for the area of the district actually irrigated, whether or not stored water is used. The water shall be diverted and distributed in such manner as may be hereafter arranged between the Board of Direc-

tors of said District and the United States. The United States will so continue to operate and maintain said project works until the issuance by the Secretary of public notice as provided in Section 4 of Reclamation Act approved June 17, 1902 (32 Stat., 388), whereupon the United States will continue the operation and maintenance of the said project in Texas under the reclamation law and public notice issued thereunder.

8. The District hereby assumes the liability for the reimbursement to the United States of the aggregate sum represented by the cost of the irrigation and drainage works heretofore constructed or hereafter to be constructed for the use and benefit of District lands, and agrees to pay the same and each installment thereof. Such aggregate sum shall include the District's proportionate share of the cost for construction of the Elephant Butte Reservoir. The total liability assumed by the District for irrigation and drainage construction purposes, exclusive of penalties, shall in no case exceed the aggregate sum of Four Million Nine Hundred Forty-one Thousand ($4,941,000.00) Dollars.

9. The charge for construction of the Elephant Butte Reservoir assumed by the District hereunder and included in the amount estimated and set forth in the preceding paragraph, is based upon the irrigable area of the project in the States of New Mexico and Texas and included within the boundaries of the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1, as such districts are now constituted. Should a contract or contracts be hereafter made between the United States and the El Paso County Conservation and Reclamation District No. 2 or any other similar dis-

trict or organization, comprising land in the States of Texas and New Mexico, or either of them, by which the payment of any part of the storage charge for the construction of the Elephant Butte Reservoir is assumed, the amount payable by the District under this contract shall be reduced in such sum as will equitably adjust and apportion the charge to be paid for the construction of said reservoir by the District hereunder with the amount to be paid on account of other lands in Texas and New Mexico which shall receive stored water from said reservoir.

10. Should the boundary line between the States of New Mexico and Texas be changed as a result of the suit now pending in the Supreme Court of the United States entitled State of New Mexico vs. State of Texas, in such manner that the boundaries of the District and the irrigable area of lands included therein are modified, the obligations under this contract shall be reduced in proportion to the acreage which may be eliminated from said district.

11. From time to time as the Secretary may determine that specified areas of irrigable district lands, not necessarily contiguous, should commence payment for the drainage and irrigation works herein provided for, he shall render a statement to such effect to the district, designating the areas of said District Lands, and shall state the amount payable for such designated areas on account of the work herein provided for; and the District will pay such amount in installments of the same percentages and subject to the penalties of the same amounts and terms as specified in Sections 2 and 3 of the Reclamation Extension Act approved August 13, 1914. Such installments shall be due on such annual date as may be

specified in said statement conformable to the state laws. The installments may, however, be divided and become payable semi-annually by contract between the Secretary and the District.

12. Until all amounts payable to the United States for the construction of the works herein provided for have been fully paid and discharged, there is reserved to the Secretary the right to make reasonable rules and regulations and to modify the same in his discretion, not, however, contrary to this contract, but to the end that the true intent of the law and of this contract shall be carried into effect, and the District agrees to use its power for the purpose of carrying out such rules and regulations and the purposes of this contract. The proper officials of the District shall have full and free access to the project books and official records of the United States Reclamation Service relative to the costs of the work herein provided for and the operation and maintenance thereof, with the right at any time during office hours to make copies of and from the same. The representatives of the United States shall have the same rights in respect to the books and records of the District.

13. The Secretary, in his discretion, if he deems lands within the District temporarily incapable of successful cultivation on account of seepage, alkaline or other conditions, may notify the District that it will be relieved from payment of the amounts payable, or a part thereof, on account of such lands for a specified period or until further notice, whereupon, the District shall exempt from assessment and levy the lands as specified during the period named. Nothing in this paragraph, however, shall be deemed to relieve the District or individual landowners from

any reasonable responsibility for improving drainage conditions and for using reasonable economy in the use of water. If the Secretary of the Interior shall deem any lands of the project permanently insusceptible of reclamation on account of seepage or other conditions, he may, in his discretion, contract with the District for the severance of the water rights from such lands and for their becoming appurtenant to the other lands within or without the District or to lands which by appropriate proceedings are brought within the District. Nothing in this paragraph contained however, shall be deemed to release the District from its liability for the reimbursement of the reclamation fund for the cost of the said works, but if transfers of water right be made to lands without the District, as in this paragraph provided and the United States shall thereby be satisfactorily secured for the proportionate reimbursement the obligation of the District shall be reduced to the same extent.

14. It is agreed that as soon as the affairs of the Association will permit, there shall be executed the necessary instruments of release of all the lands in El Paso County, Texas, included within the boundaries of the District, from the liens existing under subscriptions to stock in and trust agreements with said Association to the end that said lands shall be clear of encumbrances for the carrying out of the Reclamation Law, except such as shall be created by annual assessments by the District. No such release, however, shall be made until decree in confirmation of the proceedings for the authorization of the contract indebtedness herein undertaken and in confirmation of the validity of this contract shall have been

rendered by a district Court of Texas having jurisdiction or decision rendered by any appellate Court to which appeal shall be taken.

15. The indebtedness herein assumed by the District is understood not to be cumulative with that of one million dollars for construction purposes undertaken in favor of the United States by the District by contract of December 29, 1917, between the parties hereto, but that the maximum amount of indebtedness to the United States for construction purposes set forth in paragraph 8 hereof includes such preexisting obligation to the United States.

16. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified and during his continuance in office, and no officer, agent, or employee of the Government shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporation or company, as provided in Section 116 of the Act of Congress approved March 4, 1909 (35 Stat., L., 1109).

In Witness Whereof, this contract has been executed on behalf of the parties hereto and certified copies of resolutions of the boards of Directors of the District and the Association hereto attached and the respective seals of the said corporations hereto affixed.

THE UNITED STATES OF AMERICA,
By JOHN BARTON PAYNE,
Secretary of the Interior.
(Jun. 24, 1920.)
EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
By J. A. SMITH,
President.
EL PASO VALLEY WATER USERS' ASS'N.,
By J. A. SMITH,
President.

Attest:

T. D. PORCHER,
Secretary El Paso County Water Improvement District No. 1.
BERNABE FLORES,
Secretary El Paso Valley Water Users' Association.

Plaintiff's Exhibit 21, having been admitted in evidence, reads in words and figures as follows:

"P-21".

In the District Court of the Third Judicial District of the State of New Mexico, Within and for the County of Dona Ana.

In the matter of the Organization of the Elephant Butte Irrigation District and the Authorization of Contract with the United States for the Construction of Irrigation Works, Drainage Works, the Purchase, Extension, Operation and Maintenance of Constructed Works and the Assumption of Indebtedness to the United States on Account of District Lands.

No. 4426.

Decree of Adjudication and Authorization of Contract With the United States.

Comes now the Board of Directors of the Elephant Butte Irrigation District, by Wade & Taylor, its attorneys, and the above entitled proceeding comes on to be heard this 6th day of May, A. D. 1918, at the hour of 10 A. M. of said day upon the verified petition, filed herein, the order of this Court made and entered herein on the 19th day of March, A. D. 1918 directing the publication of summons, the proofs of publication of summons, the clerk's certificate of non-appearance and the motion of the petitioning board for decree pro confesso and final decree.

And it appearing that pursuant to the order of publication hereinabove recited the County Clerk and Ex-officio Clerk of this Court, did heretofore give and

publish a notice of the filing of the petition in the said proceeding, such notice having been given and published once each week for four successive weeks in a newspaper of general circulation published in each county wherein are situated any lands within the said irrigation district, to-wit, in the English language in the issues of March 22, A. D. 1918, March 29, A. D. 1918, April 5, A. D. 1918 and April 12, A. D. 1918, of the "Rio Grande Republic", a weekly newspaper of general circulation published at the town of Las Cruces in the said County of Dona Ana, and in the Spanish language in the issues of March 23, A. D. 1918, March 30, A. D. 1918, April 6, A. D. 1918 and April 13, A. D. 1918 of the "La Estrella" a weekly newspaper of general circulation published in Spanish at the town of Las Cruces in the said County of Dona Ana, and in both English and Spanish languages in the issues of March 22, A. D. 1918, March 29, A. D. 1918, April 5, A. D. 1918 and April 12, A. D. 1918 of the "Sierra County Advocate, a weekly newspaper of general circulation published in the town of Hillsboro in the County of Sierra, State of New Mexico, all the lands embraced with the said Irrigation District lying and being situate within the said two counties of Dona Ana and Sierra; and it further appearing that the said published notices did set forth and show the time and place fixed in and by the above recited order of this Court for the hearing of the petition, to-wit, the 6th day of May, A. D. 1918, at the hour of 10 A.M. of said day, or as soon thereafter as counsel can be heard, at the Judge's Chambers in the town of Las Cruces, State of New Mexico; and did further set forth and show the prayer of the petitioning board, to-wit, that the validity of the organization of the said Elephant Butte Irrigation District and particularly

the proceedings recited in the said petition might be judicially examined, approved and confirmed and that the proceedings likewise recited in the said petition for the authorization of a proposed contract by the said Irrigation District with the United States of America be likewise examined, approved and confirmed and that the petitioning board might have such other and further relief as to the Court might seem meet and just; and further setting forth and showing that any person interested in the organization of said district or the authorization of the proposed contract with the United States of America might on or before the day fixed for the hearing of the said petition, to-wit, the 6th day of May, A. D. 1918 at the hour of 10 A.M. of said day demur to or answer said petition.

And it further appearing in and by the clerk's certificate of non-appearance that no person has demurred to or answered the said petition or otherwise appeared in the said proceeding;

It is Therefore Ordered, Adjudged and Decreed that this Court has power and jurisdiction to examine and determine the legality and validity of each and all of the proceedings for the organization of said Irrigation District under the provisions of the laws of the State of New Mexico and to approve the same and likewise has power and authority to examine and determine the legality and validity of each and all of the proceedings for the authorization of the proposed contract with the United States of America and to approve the same and has jurisdiction of all persons interested in either the organization of said district or the authorization of the said proposed contract.

And it is Further Ordered, Adjudged and Decreed that the allegations of the petition stand as confessed and that the same be and they are hereby taken as true.

And now the Court having examined the said proceedings and being fully advised in the premises doth make the following findings:

Findings of Fact:

I.

That the Elephant Butte Irrigation District is a corporation organized and existing under and by virtue of the provisions of an Act of the Legislature of the State of New Mexico entitled "An Act to Amend Chapter 60 of the New Mexico Statutes Annotated and Chapter 100 of the Acts of the Second State Legislature approved March 18, 1915, relating to Irrigation Districts, and Providing for Co-operation Between Such Districts and the United States Government under the terms of the Reclamation Law and Acts Amendatory Thereof and Supplemental Thereto", approved March 6, 1917, and that the Petitioner is the duly elected and qualified Board of Directors thereof

II.

That for the purpose of obtaining the benefits of the above entitled Act and particularly the benefits specified and conferred in Section 1 thereof a majority of the resident freeholders owning more than one-half of the lands or the evidence of title to lands so owned in the Elephant Butte Irrigation District, situated in

part in the County of Sierra, New Mexico, and in greater part in the County of Dona Ana in the said State of New Mexico, the boundaries of such district being hereinafter set forth and referred to, on the 13th day of August, A. D. 1917 presented to the Board of County Commissioners of Dona Ana County, New Mexico, their written petition (accompanied by the bond mentioned in Section 2 of said Act) wherein it was stated and alleged that it was the purpose of the petitioning board to organize an irrigation district under the provisions of the said Act; and wherein the boundaries of the proposed irrigation district were specified and set forth, a general description thereof being as follows:

All that district or territory of land commonly known as the Mesilla Valley in Dona Ana County, New Mexico, and the Rincon Valley in part in said Dona Ana County and in part in Sierra County, New Mexico, such district or territory embracing all the irrigable lands in the Rio Grande Valley in New Mexico subject to irrigation under the Elephant Butte Dam as constructed by the Government of the United States; a particular description of the boundaries of the said district or territory being set forth in the petition hereinabove mentioned and delineated upon the map or maps on file in the respective offices of the County Clerks of said counties of Dona Ana and Sierra to which petition and maps reference is here made;

and wherein it was further stated and alleged that the means proposed to supply water for the irrigation of lands embraced within the proposed Irrigation District consisted (amongst other things) of the Ele-

phant Butte Dam and Reservoir heretofore constructed and now under operation by the United States of America and of divers diversion dams, canals, ditches, flumes, and laterals, all specifically mentioned and described in the said petition; and wherein it was further stated and alleged that the name proposed for the said district was the Elephant Butte Irrigation District; and wherein it was stated and alleged that the petitioning board had selected a committee of three of said board, to-wit, Albert S. Eyler, S. G. Kilgore and Lytton R. Taylor to present such petition to the Board of County Commissioners as provided by law; and wherein the petitioning board did pray that the said Board of County Commissioners define and establish the boundaries of said proposed district and submit the question of the final organization of the same to the vote of the qualified electors resident within said district.

All of which will more particularly and at large appear by reference to the said petition a copy of which being attached and made a part of the first mentioned petition marked Exhibit A.

III.

That pursuant to the requirements of Section 2 of the said Act the said Albert S. Eyler, S. G. Kilgore and Lytton R. Taylor (they being the three persons designated in the said petition to present the same to the said Board of County Commissioners) caused the said petition to be published in the English language once each week for four successive weeks in he "Rio Grand Republic" to-wit, in the issues of July 13, A. D. 1917, July 20, A. D. 1917, July 27, A. D. 1917

and August 3, A. D. 1917, and once each week for four successive weeks in the Spanish language in "La Estrella", to-wit, in the issues of July 11, A. D. 1917, July 18, A. D. 1917, July 25, A. D. 1917 and August 1, A. D. 1917, the said "Rio Grande Republic" and the said "La Estrella" being newspapers published in Las Cruces in the said County of Dona Ana and of general circulation within the said county, and to be published once each week for four successive weeks in the English language in the "Sierra County Advocate" to-wit, in the issues of July 13, A. D. 1917, July 20, A. D. 1917, July 27, A. D. 1917 and August 3, A. D. 1917 said "Sierra County Advocate" being a newspaper published in the English language at Hillsboro in the said County of Sierra and of general circulation in the said County of Sierra; and also caused to be published in the "Rio Grande Republic" and the "Sierra County Advocate" in the English language and in "La Estrella" in the Spanish language in each of the issues above enumerated a notice signed by the said committee, to-wit, the said Albert S. Eyler, S. G. Kilgore, and Lytton R. Taylor to the effect that the petition hereinabove mentioned and referred to would be presented to the Board of County Commissioners of the County of Dona Ana at Las Cruces in the said County of Dona Ana at 2 P.M. on Monday, August 13, A. D. 1917, such petition being a petition praying that said Board define and establish the boundaries of the proposed irrigation district and submit the question of the final organization of the same to the vote of the qualified electors resident within said district; copies of which said published notices and the proofs of publication being attached and made a part of the first mentioned petition marked Exhibit B.

IV.

That at no time at or prior to the presentation of the said petition to the Board of County Commissioners, as hereinabove recited, was there or is there now printed or published any newspaper in the County of Sierra in the Spanish language, either in whole or in part, of general or limited circulation.

V.

That at an adjourned session of the Board of County Commissioners of said County of Dona Ana held at the Courthouse in the town of Las Cruces in the said County of Dona Ana at the time mentioned in the said petition, to-wit, at the hour of 2 P.M. on August 13, A. D. 1917, the said petition was presented to the said Board by the said Albert S. Eyler, S. G. Kilgore and Lytton R. Taylor; that the said Board then and there took under consideration the said petition and, there being no objection to the same, or to the granting of the relief therein prayed, found and caused to be entered of record in the minutes of its proceedings of that date that the notice of the presentation of said petition had been given as required by law, that the said petition had been signed by the requisite number of petitioners as required by the provisions of the said Act and that all the provisions of said Act had been fully complied with; and thereupon proceeded to define the boundaries of said proposed district from the said petition and did then and there define the said district as herein above set forth and as more specifically set forth and alleged in the said petition; and did then and there make an order allowing the prayer of the petition, defining and

establishing the boundaries and designating the name of said district as the "Elephant Butte Irrigation District"; and did then and there by further order duly entered upon their records call an election of the qualified electors of said district to be held for the purpose of determining whether such district should be organized under the conditions of the said Act and by such order did submit the names of one or more persons from each of the divisions of said district as provided for in said Act to be voted for as directors therein; and for the purpose of said election did divide said district into nine divisions as nearly as equal in size as was practicable and did provide that one qualified elector of each of said divisions should be elected as a member of the Board of Directors of said district by the qualified electors of the whole district; and did establish and define a convenient number of election precincts and designate polling places; and did appoint three judges of election for each of such precincts, one of them to act as clerk of said election; and did thereupon cause notice embodying said orders in substance signed by the chairman and the clerk of said Board to be issued, given and published; giving public notice of said election; the time, to-wit, September 13, A. D. 1917, and place thereof and the matters submitted to the vote of he electors, such notice and order being published in English in the County of Dona Ana once a week for four successive weeks prior to said election in said "Las Cruces Citizen" newspaper in its issues of August 18, A. D. 1917, August 25, A. D. 1917, September 1, A. D. 1917 and September 8, A. D. 1917, and in Spanish in "La Estrella" newspaper in its issues of August 18, A. D. 1917, August 25, A. D. 1917, September 1, A. D. 1917 and September 8, A. D. 1917, and in

the county of Sierra once a week for four successive weeks prior to said election in English in said "Sierra County Advocate" newspaper in its issues of August 17, A. D. 1917, August 24, A. D. 1917, August 31, A. D. 1917 and September 7, A. D. 1917, copy of which said order and like copies of said published notices and proofs of publication being attached and made a part of the said first mentioned petition marked respectively Exhibit C and Exhibit D.

VI.

That pursuant to the orders of the said Board and in conformity with the said notice an election was had on September 13, A. D. 1917, at the various polling places in the said designated precincts by the qualified electors, as defined in the said Act, to determine the questions submitted by the said Board as aforesaid; that thereupon due return was made by the judges and clerks of said election to the said Board of County Commissioners; which thereupon, afterwards, to-wit, on the 24th day of September, A. D. 1917, the same being the second Monday next succeeding such election, at a session held for such purpose at the Court house in the said town of Las Cruces, proceeded to canvass and did canvass the returns of the said election and did then and there find and caused to be entered of record in the minutes of the proceedings of the said Board of that date that six hundred and ten (610) qualified electors had voted in the matter of the organization of the said irrigation district affirmatively and fifty-three (53) negatively, and did thereupon by its order duly entered of record find, declare and publish that the territory embraced within the said district, as hereinabove de-

fined, was duly and legally organized as an irrigation district under and in conformity with the said Act under the name and style of "Elephant Butte Irrigation District"; and did then and there declare that Felipe C. Lopez, B. B. Romig, J. W. Hollingsworth, J. S. Quesenberry, P. W. Barker, S. G Kilgore, D Rodriguez, Albert S. Eyler, & Pearl H. Bailey had received the highest number of votes for directors and had been duly elected; and did then and there cause a copy of such order, including a plat of said district, duly certified by the clerk of the said Board of County Commissioners, to be immediately filed for record in the office of the County Clerks of the said counties of Dona Ana and Sierra respectively; a copy of which said order and plat being attached and made a part of the first mentioned petition marked Exhibit E.

VII.

That the said Felipe C. Lopez, B. B. Romig, J. W. Hollingsworth, J. S. Quesenberry, R. W. Barker, S. G. Kilgore, D. Rodrigues, and Albert S. Eyler, and Pearl H. Bailey, so as aforesaid elected directors of the said Elephant Butte Irrigation District, afterwards, to-wit, on the 14th day of November, A. D. 1917, convened pursuant to notice, at the town of Las Cruces in the said County of Dona Ana and, having first qualified as required by law, organized as a board and elected Albert S. Eyler as president and appointed the said S. G. Kilgore as secretary; copy of the minutes of the proceedings of the said Board of Directors in the matter of such organization being attached and made a part of the said first mentioned petition marked Exhibit F.

VIII.

That afterwards, to-wit, on the 14th day of November, A. D. 1917, at a special meeting of the Board of Directors of the Elephant Butte Irrigation District, held pursuant to notice, the matter of the submission to the qualified voters of the said Irrigation District of the proposed contract to be entered into by the said Irrigation District and the Elephant Butte Water Users' Association of New Mexico of the one part of the United States of America on the other part, came up for consideration, such proposed contract making provision for the repayment by the said Irrigation District of the United States of America of certain moneys expended or to be expended by the United States of America in the construction of irrigation works, drainage works, and the purchase, extension, operation and maintenance of constructed works for and in behalf of the irrigable lands within said Irrigation District; that thereupon the said Board of Directors unanimously resolved that said proposed contract should be submitted to the qualified voters of said Irrigation District and ordered and directed that an election be called and held in said Irrigation District on December 20, A. D. 1917, at which there should be submitted to the qualified voters of said Irrigation District the proposed contract and made provision for polling places and the appointment of judges for such election and the giving of notice thereof in the manner provided by law; the petitioning board attaching to its petition a copy of the minutes of the proceedings of the said Board of Directors together with a copy of the said proposed contract and making the same a part of its petition marked Exhibit G.

IX.

That the said Board of Directors caused notice of the election so as aforesaid by it called for the purpose aforesaid to be given by posting notices in three public places in each election precinct in said district for at least twenty (20) days and also by publication of such notice once a week for at least four successive weeks in a newspaper of general circulation published in the said counties of Dona Ana and Sierra, to-wit, the "Rio Grande Republic" newspaper published in the English language in the said County of Dona Ana in its issues of November 16, A. D. 1917, November 23, A. D. 1917, November 30, A. D. 1917 and December 7, A. D. 1917, and in "La Estrella" newspaper published in the Spanish language in the said County of Dona Ana in its issues of November 17, A. D. 1917, November 24, A. D. 1917, December 1, A. D. 1917 and December 8, A. D. 1917, and in the English language and in the Spanish language in the "Sierra County Advocate" newspaper published in the English language in the said County of Sierra in its issues of November 23, A. D. 1917, November 30, A. D. 1917, December 7, A. D. 1917 and December 14, A. D. 1917; that such notice specified the time of holding the said election, to-wit, December 20, A. D. 1917 and submitted to the qualified voters whether or not the proposed contract should be entered into with the United States of America and stated the maximum amount of money payable to the United States for construction purposes exclusive of penalties and costs; the petitioning board attaching to its petition copies of the said posted and published notices of the said election together with the proofs of the posting and publishing thereof, making the same a part of its petition marked Exhibit H

X.

That pursuant to the said call and notice an election by the qualified voters of the said Irrigation District was held at the time specified, to-wit, December 20, A. D. 1917, at the various designated polling places within the said Irrigation District for the purpose of determining whether or not the said Irrigation District should enter into the proposed contract with the United States of America and due return thereof made; that the said Board of Directors, afterwards, to-wit, on the 24th day of December, A. D. 1917, at a special meeting duly called and held for the purpose of canvassing the returns of the said election, canvassed the said returns and thereupon found and declared and caused to be entered in the minutes of the Board that the qualified voters of said Irrigation District did not exceed in number eight hundred and fifty (850), that of these seven hundred (700) had voted in the affirmative and twenty-seven (27) in the negative and that the qualified voters so voting in the affirmative constituted a majority of the resident freeholders within said Irrigation District who are the owners in the aggregate of a majority of the whole number of acres of land belonging to the resident freeholders within said district, or the evidence of title to which was held by such resident freeholders, including resident entrymen of public lands within said district, and that the said proposed contract had been authorized and approved by the said Irrigation District; the petitioning board attaching to its petition a copy of the minutes of the proceedings of the said Board and making the same a part of its petition marked Exhibit I.

XI.

That the number of qualified voters and resident freeholders within said Irrigation District was not at the time of said proceedings in excess of eight hundred and fifty (850) and that of these six hundred and ten (610) signed the petition for the organization of said Irrigation District, six hundred and thirteen (613) voted for such organization at the election held for such purpose and seven hundred (700) voted authorizing and approving the said contract; that said Irrigation District contains approximately ninety-two thousand (92,000) acres of irrigable land, of which eighty-nine thousand (89,000) acres are situated in the said County of Dona Ana and about three thousand six hundred (3,600) acres in the said County of Sierra; that of said qualified voters within the said Irrigation District about thirty (30) in number reside within the said County of Sierra and that of the resident freeholders and qualified voters residing in so much of the Irrigation District as lies in the County of Sierra, approximately ninety (90) per cent thereof signed the petition and voted in favor of the organization of the said district; that no newspaper published in the said County of Sierra has any subscription or circulation amongst the residents of that part of the Irrigation District within the said County of Sierra; that "La Estrella" newspaper, hereinabove mentioned, published entirely in the Spanish language, in which all notices relating to said proceedings were published in the Spanish language has a subscription and a general circulation among the residents of said Irrigation District within the said County of Sierra; and that all the resident freeholders are qualified voters within the said Irrigation District within the said County of Sierra

had in fact knowledge of the proposed organization of the said Irrigation District and of the election for authorization of the proposed contract in time sufficient to enable them to oppose the proposed action if they saw fit so to do.

Conclusions of Law.

1. That notice of the petitions hereinabove recited was duly given and published for the time and in the manner in the said Act prescribed.

2. That neither in the proceedings relating to the organization of said irrigation district nor in the proceedings relating to the authorization of said contract did any irregularity, error or omission occur that would or did in any way affect the substantial or other rights of any party or parties in interest.

3. That all the requirements of the Act of the Legislature of the State of New Mexico hereinabove recited have been in the matter of the organization of the said Elephant Butte Irrigation District fully complied with and that the petitioner, the Board of Directors of the Elephant Butte Irrigation District, is enitled to a decree approving and confirming the organization of the said district and declaring the Elephant Butte Irrigation District a body corporate duly organized under the provisions of the said Act and possessing all the powers, rights and privileges in the said Act conferred.

4. That all the requirements of the Act of the Legislature of the State of New Mexico, in the matter of the authorization and approval by the qualified

voters of the said irrigation district, of the proposed contract, the same being a contract for the construction of irrigation works, drainage works, the purchase, extension, operation and maintenance of constructed works, and the assumption of indebtedness to the United States on account of district lands with the counties of Sierra and Dona Ana in the State of New Mexico entered into on the 7th day of January, A. D. 1918 by and between the United States of America, by ..... Secretary of the Interior, under the provisions of the Act of Congress approved June 17, A. D. 1902 (32 Stat. 388) and Acts amendatory thereof and supplemental thereto, all known and referred to as the "Reclamation Law", of the first part, and the Elephant Butte Irrigation District of the second part and the Elephant Butte Water Users' Association of New Mexico of the third part, have been fully and in all respects complied with and that the petitioner, the Board of Directors of the Elephant Butte Irrigation District is entitled to a decree approving and confirming all the proceedings with reference to the authorization of the said proposed contract and declaring the said proposed contract duly and legally authorized by the qualified voters of the Elephant Butte Irrigation District and that the said contract is a binding and subsisting obligation of the said district.

It is Therefore Ordered, Adjudged and Decreed that in the matter of the organization of the Elephant Butte Irrigation District the provisions of an Act entitled "An Act to Amend Chapter 60 of the New Mexico Statutes Annotated and Chapter 100 of the Acts of the Second State Legislature, approved March 18, 1915, Relating to Irrigation Districts and Providing for Co-operation Between Such Districts and the

United States Government under the terms of the Reclamation Law and Acts Amendatory Thereof and Supplemental Thereto, approved March 6, 1917" have been in all respects fully complied with; that the Elephant Butte Irrigation District is a body corporate duly and legally organized under the provisions of the said Act and possesses all the powers, rights privileges and immunities therein conferred; and that all parties interested in or affected by the organization of the said Elephant Butte Irrigation District be and they are hereby forever barred and estopped from contesting or in any manner questioning the regularity of the proceedings hereinabove recited or the validity and legality of the organization of the said body corporate.

And it is further Ordered, Adjudged and Decreed that the proceedings had in the matter of the authorization of the said proposed contract be and they are hereby in all respects ratified, approved and confirmed and that the said proposed contract be and the same is hereby declared to be a binding and subsisting obligation of the said irrigation district.

Dated at Las Cruces, New Mexico, this 6th day of May, A. D. 1918.

(S.) EDWARD L. MEDLER,
District Judge.

District Court Certificate.

State of New Mexico,
County of Dona Ana. ss.

I, the undersigned, do hereby certify that I am the regularly appointed, qualified and acting Clerk of the

District Court of the Third Judicial District of the State of New Mexico within and for the County of Dona Ana, I am lawful custodian of the records of said Court for said Dona Ana County and I further certify that the foregoing and annexed sixteen (16) pages of typewritten matter is a full, true and correct copy of that certain Decree of Adjudication and Authorization of contract with the United States, filed in Civil Cause No. 4426 which is entitled: In the Matter of the Organization of the Elephant Butte Irrigation District and the authorization of contract with the United States for the Construction of Irrigation Works, Drainage Works the purchase, extension, operation and maintenance of constructed works and the assumption of indebtedness to the United States on account of district lands, on the 6th day of May, A. D. 1918 and entered upon the records of the above entitled Court in Record Book "J" at page 215 and now on file and properly of record in my said office.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court, in my office at Las Cruces, Dona Ana County, New Mexico, on this the 24th day of December, A. D. 1952.

(S.) GERALDINE S. MATHISEN,
(Geraldine S. Mathisen),
Clerk of the District Court of the Third Judicial District within and for the County of Dona Ana and State of New Mexico.

State of New Mexico,
County of Dona Ana. ss.

I, W. T. Scoggin Presiding Judge of the Third Judicial District of the State of New Mexico, in and for the County of Dona Ana do hereby certify that Geraldine S. Mathisen is the Clerk of the District Court in and for Dona Ana County, State of New Mexico which is a Court of record, having a seal; that the signature to the foregoing certificate and attestation is the genuine signature of the said Geraldine S. Mathisen as such officer; that the seal annexed thereto is the seal of said District Court; that the said Geraldine S. Mathisen as such Clerk is the legal custodian of the original records of documents described and referred to in the foregoing certificate; is the proper officer to execute the said certificate and attestation, and such attestation is in due form according to the laws of the State of New Mexico.

In Witness Whereof, I have hereunto set my hand in my official character as such Presiding Judge, at the City of Las Cruces, County and State aforesaid this the 24th day of December, A. D. 1952.

(S.) W T. SCOGGIN.
(W. T. Scoggin),
Presiding Judge of the
Third Judicial District
Court, State of New Mexico; in and for the County
of Dona Ana

State of New Mexico,
County of Dona Ana. ss.

I, Geraldine S. Mathisen, Clerk of the Third Judicial District Court in and for the County of Dona Ana

State of New Mexico, (which Court is a Court of record, having a seal which is annexed hereto), do hereby certify that W. T. Scoggin, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Presiding Judge of the District Court aforesaid and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the seal of the District Court at my office in said Court, this the 24th day of December, A. D. 1952.

(S.) GERALDINE S. MATHISEN,
(Geraldine S. Mathisen),
Clerk of the District Court
in and for the County of
Dona Ana, State of New
Mexico.

* * * * * * * *

Plaintiff's Exhibit No. 22, having been admitted in evidence, reads in words and figures as follows:

"P22"

Department of the Interior: United States Reclamation Service, Rio Grande Irrigation Project.

Contract Between the United States and El Paso County Water Improvement District No. 1, Supplementary to Contract of January 17, 1920.

This Agreement, made this 12th day of October 1922, by and between the United States of America,

herein styled the United States, acting for this purpose by E. C. Finney, First Assistant Secretary of the Interior, herein styled the Secretary, under the provisions of the act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, herein styled the reclamation law, and the El Paso County Water Improvement District No. 1, herein styled the District, a public corporation duly formed under the laws of the State of Texas, having its principal place of business at El Paso, El Paso County, Texas, witnesseth:

Explanatory Recitals.

2. Whereas, contract between the District and the United States dated January 17, 1920, provides that the District shall pay to the United States the maximum sum of Four Million Nine Hundred Forty-one Thousand Dollars ($4,941,000.00), on account of the cost of the irrigation system of the Rio Grande Federal irrigation project; and

3. Whereas, under an election held on September 25, 1920, the boundaries of the District were extended by the inclusion of approximately 8,000 acres of lands known as the Tornillo tract, heretofore included in El Paso County Conservation and Reclamation District No. 2; and

4. Whereas, the District now desires the construction of additional works for the benefit of irrigable lands of the District as now constituted;

5. Now, Therefore, in consideration of the mutual covenants herein contained, it is agreed:

Construction of Project Works by the United States

6. The United States will expend, in addition to the amounts heretofore covered by said contract of January 17, 1920, the sum of One Million One Hundred Sixty-five Thousand Dollars ($1,165,000.00), or so much thereof as may be appropriate and necessary, in the opinion of the Secretary, for additions to existing storage works, for the improvement and extension of the present distribution system, for flood protection, for drainage works, and for general project features. Such portion of said distribution system as may be utilized to advantage shall be used. The contemplated work shall include the construction or reconstruction of approximately 110 miles of canals and laterals as tentatively laid out and shown on a map, dated March 4, 1922, entitled "El Paso County Water Improvement District No. 1, Proposed Distribution and Drainage System," on file in the office of the Project Manager of the Rio Grande project. Also in addition to the drainage works heretofore provided for, the contemplated work shall include about 39 miles of main drainage canals, the tentative locations of which are shown on the said map. The Secretary shall have the right to make such changes in the works shown on said map as he may deem appropriate.

Payment by District For Project Works.

7. The District shall pay to the United States as a part of the construction cost of the project, the aggregate cost of all works constructed under Article 6 hereof, according to the terms of payment named in Article 10 hereof; Provided, That such aggregate cost, exclusive of the amount stated in Article 8 hereof shall in no event exceed the sum of One Million

One Hundred Sixty-five Thousand Dollars ($1,161,000.00).

Payment by District For Supplies and Equipment.

8. Upon completion of the work provided for by Article 6 hereof, the District shall take over from the United States, (a) such materials and supplies purchased for work in the district as shall remain on hand, and (b) the machinery, equipment, and plant procured for district work and not required elsewhere by the United States. The District shall pay to the United States as a part of the construction cost of the project, according to the terms if payment named in Article 10 hereof, the value of said materials and supplies and of said machinery, equipment and plant: Provided, That such value shall not exceed the sum of One Hundred Fifty Thousand Dollars ($150,000.00). In determining the value of the property to be taken over by the District under this Article, said materials and supplies shall be valued at their cost to the United States, and said machinery, equipment, and plant shall be valued at their cost to the United States less any portion thereof theretofore charged to project work as depreciation. The obligation described in this Article is additional to the obligation described in Article 7 hereof.

Computation of Cost.

9. The cost of the work provided for by this contract, which the District obligates itself to pay, shall embrace all expense of whatsoever kind in connection with, growing out of, or resulting from, the work described, including the cost of labor, material, equipment, engineering, legal work, superintendence, ad-

ministration, overhead, rights of way, property and damage of all kinds; and in determining the total amount of such cost the project books of the United States Reclamation Service shall be accepted as conclusive.

Time and Manner of Payment By District.

10. From time to time as the Secretary of the Interior may determine that specific areas of irrigable District lands, not necessarily contiguous, should commence payment for the construction cost of the project works under this contract and said contract of January 17, 1920, he shall render a statement to the District designating the areas of said lands and shall state the amount of such construction cost payable for such designated areas. The District shall pay to the United States such amount in instalments of the same percentages and subject to the same penalties as specified in Sections 2 and 3 of the Reclamation Extension Act of August 13, 1914 (38 Stat., 686). Such instalments shall be due on such annual or semi-annual dates, conformable to the tax laws of the State of Texas, as shall be specified in said statement.

Contract Subject to Appropriations by Congress.

11. This contract is subject to appropriations being made by Congress, from year to year, of moneys sufficient to do the work provided for herein. No liability shall accrue against the United States by reason of such moneys not being appropriated. Should only a portion of the moneys necessary to complete the work so provided, then the amount to be repaid by the

District to the United States for such work shall be reduced to an amount equal to the sum actually expended.

This Contract Supplementary to Contract of January 17, 1920.

12. This contract is supplementary to said contract of January 17, 1920, and shall be subject to all of the terms and conditions of the latter so far as the same are applicable.

Member of Congress Clause.

13. No member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified and during his continuance in office, and no officer, agent, or employee of the Government, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in section 116 of the act of Congress approved March 4, 1909 (35 Stat., 1109.)

Successors and Assigns Obligated.

14. It is understood and agreed that the terms of this contract shall inure to the benefit of and be binding upon the successors in interest and assigns of the respective parties.

In Witness Whereof the parties hereto have caused these presents to be duly executed by their respective officers the day and year first above written.

THE UNITED STATES OF AMERICA,
By E. C. FINNEY,
(Seal) First Assistant Secretary of the Interior.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
By T. D. PORCHER,
(Seal) President.

Attest:

IDUS T. GILLETT,
Secretary.

* * * * * * * *

Plaintiff's Exhibit 23, having been admitted in evidence, reads in words and figures as follows:

"P 23".

United States Department of the Interior Bureau of Reclamation.

Rio Grande Project, New Mexico-Texas.

Contract between the United States and the El Paso County Water Improvement District No. 1 adjusting construction charges and for other purposes.

This agreement made this 10th day of November, 1937, under the provisions of the Act of June 17, 1902

(32 Stat. 388) and acts amendatory thereof and supplementary thereto, and especially the statutory provisions (quoted in Article 3 hereof) relating to the Rio Grande project and contained in the Bureau of Reclamation part of the Interior Department Appropriation Act, fiscal year 1938, approved August 9, 1937, (Public No. 249, 75th Congress, 1st Session), all said acts being hereinafter comprehensively referred to as the reclamation Law, by and between the United States of America, acting for this purpose by and through Oscar L. Chapman, Assistant Secretary of the Interior, and the El Paso County Water Improvement District No. 1, and irrigation district duly organized and existing under the laws of the State of Texas.

Witnesseth That:

Definitions.

Article 2. As used herein the following abbreviated terms mean the terms set out directly thereafter as follows:

United States—United States of America.

Secretary—Secretary of the Interior.

District—El Paso County Water Improvement District No. 1.

Association—El Paso Valley Water Users' Association

Contract of June 27, 1906 as amended and supplemented—the following contracts between the United States and the El Paso Valley Water Users' Association and the El Paso County Water Improvement District No. 1;

1. Joint contract with the Elephant Butte Water Users' Association and the El Paso Valley Water Users' Association, dated June 27, 1906.

2. Contracts with Association, dated August 19, 1916, and August 13, 1917.

3. Joint contract with Association and District, dated December 29, 1917.

4. Joint contract with Association and District, dated January 17, 1920.

5. Contracts with District, dated July 1, 1922, October 12, 1922, August 2, 1926, July 16, 1928, August 4, 1928, Sepember 3, 1929, and November 2, 1932.

Power Privilege Agreement—Joint contract between the United States, the District and the Elephant Butte Irrigation District, dated May 10, 1928

Storage system—Elephant Butte Dam and Reservoir and appurtenant works and the Caballo Dam and Reservoir and appurtenant works.

Power system—Power plants, transmission lines etc constructed or to be constructed for development of power.

Irrigation and Drainage system—All project works except the Storage and power systems.

Explanatory Recitals.

Article 3. Whereas, the Interior Department Appropriation Act, fiscal year 1938, under the caption "Bureau of Reclamation" contains the following provision in the item for the Rio Grande project, New Mexico-Texas:

"Provided, That the Secretary of the Interior hereby authorized to enter into a contract with t. El Paso County Water Improvement District Numbered 1 and the Elephant Butte Irrigation District of New Mexico by which the districts will be relieved of the obligation of making payment of the construction cost chargeable to the development of power of Elephant Butte Dam in the amount determined as equitable by the Secretary of the Interior in return for the conveyance by the said two districts to the United States of all the districts' right, title, interest, and estate in the use of said dam and other project works including the project water supply, for the development of hydro-electric energy; Provided further, That in such contracts it shall be stated that the use of the dam, project works and water supply for power purposes shall not deplete or interfere with the use thereof for irrigation purposes: Provided further, That the net earnings of the power plant and system belongings to the United States and any other available revenues shall be applied, until the cost thereof has been met, upon the cost of the power development, including (1) the cost of power facilities, (2) the amount invested as herein authorized in the

cost of Elephant Butte I am, and (3) the amount invested by the Bureau of Reclamation in Caballo Dam: Provided further, That after the cost of the power development has been met the net earnings of the power plant and system shall be disposed of as Congress may direct."

Article 4. Whereas, the District desires to receive (1) the benefits of the provisions of the Interior Department Appropriation Act hereinbefore quoted and also (2) the benefits of the provisions of other acts of Congress relating to the repayment of charges in return for the conveyance by the District, for itself and the landowners therein, to the United States of all the right, title, interest, and estate of the district and its landowners in the use of said dam and other project works, including the project water supply for the development of hydroelectric energy.

Now, Therefore, in consideration of the covenants herein contained, it is agreed between the parties as follows:

District Relieved of Obligation for Construction Cost Chargeable to Power.

Article 5. The equitable amount of the construction cost of the storage system (exclusive of Caballo Dam and reservoir) chargeable to power development, as determined by the Secretary and accepted by the District is $4,246,408.39, computed as follows:

Cost of Storage System (exclusive of Caballo Dam and reservoir)	
Elephant Butte dam and reservoir	$5,219,663.53
Related features—roads, etc	26,744.86
	$5,246,408.39

Less—Direct Appropriation (Non-reimbursable) Act of March 4, 1907 (34 Stat., 1357)	1,000,000.00
Balance chargeable to power development	$4,246,408.39

The United States, pursuant to the provisions of the Interior Department Appropriation Act, fiscal year 1938, hereinbefore quoted, will and hereby does relieve the District of 43.2258 per centum of the amount herein fixed as the equitable amount of the construction cost chargeable to power development, or $1,835,544.00, and will and hereby does reduce the District's obligation for the repayment of its share of the construction cost of the project from $6,106,000.00 which the District assumed and agreed to pay to the United States under the contract of June 27, 1906, as amended and supplemented, to $4,270,456.00.

Operation and Maintenance Cost for Irrigation and Drainage System, Calendar Year 1937, Added to Construction Obligation.

Article 6. The notice issued February 11, 1937, to the District by the Secretary, pursuant to the provisions of the contract of June 27, 1906, As amended and supplemented, announcing the estimated cost of operating and maintaining that portion of the Rio Grande project irrigation and drainage system which is utilized for the benefit of lands within the District for the irrigation season 1937 (calendar year 1937), and requiring the payment of a reservoir or storage charge for certain lands is hereby rescinded. In lieu thereof, the District's share of the cost of opera-

tion and maintenance of the irrigation and drainage system (exclusive of the storage system) for the calendar year 1937, estimated at $156,000 will be added to and shall be payable with the reduced construction obligation fixed in article 5 hereof. In the event that the District's share of the actual cost of operation and maintenance during the calendar year 1937, as conclusively determined by the Secretary, is less than the estimated amount thereof, the excess of estimate over cost will be credited as a reduction of the construction charge installment due and payable by the District to the United States in the calendar year 1938; in the event that the District's share of the actual cost is greater than the estimated amount, the excess of cost over estimate will be added to the construction charge installment due and payable by the District of the United States in the calendar year 1939.

Interest on Construction Charges Deferred Under The Act of April 1, 1932, as Amended and Supplemented Added to the Construction Obligation.

Article 7. Pursuant to the acceptance by the District of the Act of April 1, 1932, (47 Stat., 75), as amended and supplemented, extending the time of payment for all or part of construction charge installments for the years 1930 to and including 1936, the District is obligated to pay the United States interest charges in the amount of $16,933.44. The District agrees to pay such interest charges to the United States hereinafter provided as a part of the adjusted construction charge obligation.

District Assumes Payment of the Adjusted Construction Obligation.

Article 8. The District assumes and agrees to pay the adjusted construction charge obligation of $4,443,389.44, being the total of the items set forth in articles 5, 6, and 7, above. It is understood and agreed that the District has paid to the United States construction charges aggregating $1,407,933.85 and will on or before the execution by it of this contract pay, with accrued penalties the balance of $1,541.75 of the 1936 construction charge installment, due and payable on March 1, 1937, and it is also understood that the Department of Justice has paid to the Reclamation Fund on behalf of the Detention Farm area of 400 acres included in the Texas portion of the project, the sum of $25,040.00. The aggregate amount of $1,434,515.60 will be applied to the payment of the adjusted construction obligation of $4,443,389.44 and the District agrees to pay the resulting balance of the construction charge obligation, viz., $3,008,873.84, in fifty equal successive semi-annual installments, on March 1, and September 1 of each year commencing with the first payment due and payable on March 1, 1938, and ending with the last payment due and payable on September 1, 1962, the instalments for 1938 and 1939, however, being subject to possible adjustment as provided in Article 6 hereof.

Segregation of Project Features for Purposes of Operation and Maintenance—1937 and Thereafter.

Article 9. The United States will continue the operation and maintenance of the project until otherwise provided. Beginning with the calenlar year 1937,

the operation and maintenance of the project will be segregated as (a) operation and maintenance of the storage system and power system, and (b) operation and maintenance of the remainder of the project, hereinafter referred to as the irrigation and drainage system.

Operation and Maintenance of Storage System for Delivery of Irrigation Water.

Article 10. For the Calendar year 1937, and thereafter during the period of the repayment of the remaining construction obligation of the District as fixed in article 8 hereof, the District will pay to the United States, in lieu of regular operation and maintenance charges for the storage system, and in lieu of the storage water rental charge heretofore collected for lands not designated for payment of construction charges, a reservoir service charge of ten cents (10 cents) per acre-foot for each and every acre-foot of water, reasonably necessary for irrigation, made available for the lands of the District at the turnouts of the Elephant Butte dam, until the Caballo Dam is completed, thenceforth at the turnouts of the Caballo Dam. Because of the requirement for the payment of the reservoir service charge as herein provided, the provisions of the contracts between the District and the United States, and of the notice of February 11, 1937, given by the First Assistant Secretary to the District, requiring the payment of an annual storage water rental charge for the calendar year 1937 of fifty cents (50 cents) per acre for the total area within the district for lands not designated for commencing payment of construction charges shall be inoperative for the calendar

year 1937, and such annual storage rental charges shall not be collected by the United States for subsequent years.

The officer of the Bureau of Reclamation in charge of the Rio Grande project will render on or before October 15, 1937, and on or before October 15 of each year thereafter, a statement to the District of the number of acre-feet turned out of the reservoir for the lands within the District and the amount due hereunder for the then preceding twelve months, and the District will pay the amount stated in such notice on or before the first day of March following rendition of the statement. Payments for such reservoir service shall continue for each year during the period of repayment of the remaining construction obligation of the District as provided in Article 8 hereof. For the year immediately following the year for which the last installment of the adjusted construction obligation is payable and for each succeeding year thereafter, the Secretary will make an equitable determination of the District's share of the estimated cost of operating and maintaining the storage system for irrigation purposes and the amount so determined annually shall be included in and combined with the annual estimate of operation and maintenance of the irrigation and drainage system and shall be due and payable at the same time and in like manner as provided in Article 11 hereof.

Operation and Maintenance for 1938 and Thereafter Payable in Advance.

Article 11. The period during which the United States continues after January 1, 1938, to operate and

maintain the Rio Grande project for and within the District, will hereinafter be referred to as the Government maintenance period. The District will, during the Government maintenance period, pay to the United States in advance the estimated cost of operating and maintaining that portion of the project, other than the storage and power systems, which is utilized for the benefit of lands within the District. Such estimated cost for the calendar year 1938 is $156,000, of which the amount of $37,000.00 shall be due and payable on or before December 15, 1937, and the amount of $72,900 thereof shall be due and payable on or before February 15, 1938, and the remainder thereof in the amount of $46,100 shall be due and payable on or before July 15, 1938. Each year thereafter during the Government maintenance period the annual estimated cost shall become due and payable in the following manner: On or before September 1, 1938, and on or before September 1 of each subsequent calendar year during the Government maintenance period, the Secretary will notify the District of the amount of the District's proportion of the estimated operation and maintenance cost (including all necessary equipment materials and supplies, proper overhead and general charges) in operating and maintaining the project works, other than the storage and power system, during the calendar year next succeeding the year in which the notice is given. Such notice will state the District's share of such estimated cost (a) for the first two months of the calendar year next succeeding, (b) for the five next succeeding months, and (c) for the remaining five months of the calendar year for which notice is given. The amount stated for the first two months of the calendar year shall be due and payable on or before

December 15 of the year in which the notice is given; the amount stated for the next succeeding five months shall be due and payable on or before February 15 of the calendar year next succeeding the year in which the notice is given; and the amount stated for the last five months of the calendar year shall be due and payable on or before July 15 of the calendar year next succeeding the year in which the notice is given. As soon as practicable after the close of the calendar year for which notice of the estimated cost of operation and maintenance is given, the District will be furnished a statement of actual cost of such operation and maintenance and the District's proportionate share thereof, and any excess of payment upon the basis of estimated costs over actual costs shall be credited upon the payment due and payable by the District on July 15 next succeeding such calendar year. If in the opinion of the Secretary the estimate of such operation and maintenance cost appears to be insufficient to meet the actual cost thereof he shall give notice of such threatened deficiency and his estimate of the amount thereof and the District's share thereof, and the District shall pay to the United States its proportion of the amount of such deficiency within 15 days from the date of such notice. Should the District fail to make payment of any operation and maintenance charges at the time and in the manner above provided, the United States will be under no further obligation to deliver water to any land within the District, beyond funds available therefor.

District to Receive Credit for Water Rental Collections from Hudspeth County Conservation and Reclamation District.

Article 12. Pursuant to subsection J of section 4 of the Act of December 5, 1924 (43 Stat., 703), collections of water rental charges under the contract between the United States and the Hudspeth County Conservation and Reclamation District No. 1, dated December 1, 1924, as heretofore or hereafter amended and supplemented, during the calendar year 1937, and annually thereafter, will be credited to the District's obligations as follows: The District's pro rata share thereof as conclusively determined by the Secretary will be segregated by construction component and operation and maintenance component as also conclusively determined by the Secretary. The construction component will be credited to the payment of the District's construction charge installment next due and payable after the collection of such water rental charge is made from the Hudspeth District, and the operation component will be credited to the payment of the District's operation and maintenance payment next due and payable after the collection of such water rental charge is made from the Hudspeth District.

Irrigation use of Project Water. Supply is primary Use.

Article 13. In carrying out the provisions of this contract the United States shall operate the Elephant Butte Dam and other project works connected therewith, including the project water supply for power purposes so as not to deplete or interfere with the use thereof for irrigation purposes. The storage works will be operated primarily for irrigation purposes and water is not to be released from Elephant Butte Reservoir for the development of power except to the ex-

tent that such water may be retained in the Caballo reservoir until needed and released for irrigation purposes. Water thus intercepted and stored in the Caballo reservoir shall not be released therefrom in excess of release estimated to be reasonable necessary to met the requirements for irrigation purposes, for treaty allowances to the Republic of Mexico as provided in the treaty proclaimed January 16, 1907 and for flood control needs. Nothing in this contract shall ever be construed or interpreted so as to alter, diminish, or impair the right of project land owners to such water rights as may be or become appurtenant to their lands under the Federal Reclamation Laws and under the original contracts entered into between the original water users' association on this project and the United States.

Designation of Areas Subject to Construction Charges No Longer Necessary.

Article 14. Because of the change in the relations between the District and the United States as herein provided regarding the payment of the adjusted construction charge obligation, the parties hereto hereby rescind the provisions of Article 7 of the contract of December 29, 1917, and similar provisions of later contracts between the District and the United States, so far as said provisions require that, from time to time, as the Secretary may determine that specified areas of irrigable district lands, not necessarily contiguous, should commence the payment of the construction charge of the irrigation works, he shall render a statement to such effect to the district, designating the areas of said district lands, stating the amount of the construction charge payable for such designated areas.

Additional Construction Work.

Article 15. The United States will continue with the construction of the irrigation and drainage features of the project, contingent upon appropriations therefor being made available by Congress, to the extent that the District's adjusted construction charge obligation will permit. It is understood that, if for any reason the total construction cost chargeable to District lands is less then the District's adjusted construction obligation, the District will be relieved of the payment of such excess through a reduction to the extent of such excess of the construction charge installments payable at the end of the repayment period fixed herein, such reductions being applicable on said construction charge installments in the inverse order of due dates.

United States to Perform Work with Contributed Funds.

Article 16. Pursuant to the Act of Congress of March 4, 1921 (41 Stat., 1367, 1404) the United States during the Government maintenance period will perform with funds contributed by the District such betterment or additional maintenance work on the project as may be deemed necessary by the District and approved by the Secretary. Before undertaking any such work the United States will be furnished with the necessary contributed funds, in one or more installments as may be agreed upon, accompanied by a certified copy of a resolution of the board of directors of the District, setting forth the nature of the work desired and authorizing its performance with such contributed funds. Upon the completion of the

work so authorized, the District will be furnished with a statement of the cost thereof, and any unexpended balance of such contributed funds will be refunded to the District or applied otherwise as the District may direct.

Cancellation of Power Privilege Agreement.

Article 17. The District and the United States hereby rescind that certain Power Privilege Agreement described in Article 2 hereof.

District Conveys Power Interests.

Article 18. The District for itself, and its water users and landowners and for its and their successors and assigns, does hereby convey, and grant to the United States all of its and their claims of right, title, interest and estate, present and prospective in th use of the Elephant Butte Dam and other project works, including the project water supply, for the development of hydroelectric energy by the United States: Provided that the use of said dam, project works and water supply for power purposes shall not deplete or interfere with the use thereof for irrigation purposes: and Provided further, That the net earnings of the power plant and system belonging to the United States and any other available revenues accruing to the United States by reason of Government ownership of the power plant and system shall be applied in accordance with the provisions of the item in the Interior Department Appropriation Act, fiscal year 1938, as set out in Article 3 hereof.

The validity of the conveyance to the United States as contained in this Article, is of the essence of this

agreement. A contract similar to this (hereinafter referred to as the Elephant Butte Contract) is being made coincidently with the Elephant Butte Irrigation District, containing the portion of the Rio Grande Federal Reclamation project that lies in the State of New Mexico, and the Elephant Butte contract contains an article similar to Article 18 hereof. Should the conveyance to the United States in Article 18 hereof, or in the similar article of the Elephant Butte contract, ever be held invalid or ineffective in whole or in part, as to either district, or as to any water used or landowner or group of landowners in either or both districts, the Secretary may, by notice to the District, terminate this agreement, whereupon the rights and obligation of the parties hereto shall be reinstated, so far as practicable, as if this agreement has not been made. Any landowner of the district, or any holder of a mortgage or lien upon land in the district, who does not object to the confirmation of this contract by the Courts shall be estopped thereafter to question the validity of this conveyance. Likewise any landowner of the district, or any holder of a mortgage or lien upon land in the district, who accepts the benefits of this agreement in the reduced construction installments permitted hereby, shall be deemed conclusively to have accepted this agreement and to have acceded to the conveyance herein made, so far as his land or interest is concerned.

Agreed Charges a General Obligation of the District.

Article 19. The District is obligated to pay to the United States the full amounts herein agreed upon according to the terms stated, notwithstanding any individual default in the payment of any assessments,

tolls or charges levied by the District to secure funds to meet charges due to the United States.

District to Use All Powers to Collect.

Article 20. All construction and operation and maintenance charges due to the United States hereunder shall be paid as required by this contract to the proper fiscal officer of the United States. The amounts due the United States shall be a first charge upon the collections of said district. The District agrees that it will cause to be levied and collected all necessary assessments, including a sum to cover (1) any individual collection delinquency for past years and (2) estimated individual collection delinquency for the year for which assessments are being levied, and will use all powers and resources of the District, including the taxing power of the District and the power to withhold delivery of water, to collect and pay to the United States all charges provided for in this contract in full on or before the day that the same become due.

No Water to be Delivered Without Payment.

Article 21. Pursuant to the provisions of Section 6 of the Act of Congress of August 13, 1914 (38 Stat. 686) no water shall be delivered to or for any tract of land receiving water through the project works, the owner or holder of which shall be in arrears for more than one (1) year for the payment of any charge for operation and maintenance, or any annual construction charge, and penalties, or any assessments levied by the District for the purpose of paying construction or operation and maintenance

charges, or who after the beginning of the year 1938 shall fail to pay in advance the annual operation and maintenance charges.

Water Users Accepting Benefits of Contract Estopped.

Article 22. It is understood that the consideration hereof running to the District is the benefit conferred under the provisions of the Act set out in Article 3 hereof and of the Acts of December 5, 1924 and May 26, 1926, and that any landowner or water user of the District who accepts any such benefits under the terms hereof shall be estopped to disclaim any part of the obligation of the District hereunder. If (a) in any Court action at the instance of the District or any of its officers, landowners or water users, this contract or any of its provisions are held to be void, so that in the opinion of the Secretary the contract becomes substantially incapable of performance, or if (b) in any Court action at the instance of Elephant Butte Irrigation District or of any of its officers, landowners or water users, the Elephant Butte contract, as defined in Article 18 hereof, or any of its provisions are held to be void, so that in the opinion of the Secretary that contract becomes substantially incapable of performance, the District and its landowners or water users shall revert to the terms and conditions of the contract of June 27, 1906, as amended and supplemented with like effect as though this contract had never been executed.

Payment of Interest Charges.

Article 23. Upon every sum of money required to be paid to the United States by this contract and not

paid when due, interest at the rate of six (6) per centum shall be added from the due date until the date of payment, and the District hereby agrees to pay such interest.

Secretary Arbiter of Questions of Fact.

Article 24. Whenever in this agreement an estimate or determination of fact is required or any question of fact is left undetermined by the provisions hereof, the Secretary shall make any and all such estimates and determinations of fact and decisions upon any and all questions of fact which may arise hereunder, and the secretary's estimate, determination or decision thereof or thereon shall be binding and conclusive upon the parties to this agreement.

Access to Books and Records.

Article 25. The proper officer or agents of the District shall have full and free access to all reasonable times to the project account books and official records of the United States relating to the construction, acquisition, care, operation and maintenance of the irrigation and drainage works, with the right at any time during office hours to make copies of, or from, the same or any of them, and the proper representatives of the United States shall have similar rights in respect to the acount books and records of the District.

Election and Confirmation.

Article 26. The execution of this contract shall be authorized by the qualified electors of the District at

an election held for that purpose and thereafter the District shall prosecute to final decree, proceedings in a Court of competent jurisdiction for the confirmation of this contract. The United States shall not be required to proceed under the terms of this contract until (1) a confirmatory final judgment in such proceeding shall have been finally rendered, and (2) the Elephant Butte contract shall have been authorized at an election and confirmed by the Courts of the State of New Mexico. The District shall furnish the United States certified copies of all proceedings relating to said election and confirmatiin proceedings.

Reversion to Contract of June 27, 1906 as Amended And Supplemented on Failure of this Contract.

Article 27. In the event of a failure of the authorization of this contract at an election called for that purpose or in confirmation proceedings subsequently brought, this contract shall be void and of no effect and the parties hereto shall revert to the contract of June 27, 1906 as amended and supplemented with like effect as though this contract had never been executed.

This contract is also not to become effective for any purposes unless and until the Elephant Butte Contract, as defined in Article 18 hereof, is voted and confirmed and becomes effective.

Provisions of the Contracts as Amended and Supplemented Shall Remain Effective.

Article 28. This agreement is supplemental to the contract of June 27, 1906 as amended and supple-

mented, and it is agreed that the terms and conditions thereof shall remain unaffected by the provisions hereof, except as they are modified by said provisions.

Remedies Saved to the United States.

Article 29. The mention of any remedies to the United States herein or in such contract of June 27, 1906 as amended and supplemented, for breach of any of said contracts shall not be understood to exclude the United States from any other remedy which it may have, and it is further understood that all rights of action for breach of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

Officials Not to Benefit.

Article 30. No member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of this contract or any benefit to arise therefrom. Nothing, however, herein contained shall be construed to extend to any incorporated company, if the contract be for the general benefit of such corporation or company.

In Wtness Whereof, the parties have hereto subscribed their names the day and year first above written.

THE UNITED STATES OF AMERICA,
By OSCAR L. CHAPMAN,
(Seal) Ass't. Secretary of the Interior.
EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
By T. D. PORCHER,
President.

Attest:

IDUS T. GILLETT,
Secretary.

Mr. Edwards:

We now offer a document marked "Plaintiff's Exhibit No. 24" (Reporter marks same), which is an exemplified copy of a judgment of the New Mexico Court approving the Elephant Butte Irrigation District contract of November 9, 1937 with the United States of America, and offer it for the same reason that the other approval of the former contract was offered.

Mr. Grambling:

We object to that, your Honor, on the ground that it is immaterial to any issue in this case and could not be binding upon the defendant in this suit.

The Court:

Overruled.

Mr. Grambling:

Note our exception. What is the date of that judgment, Mr. Edwards?

Mr. Edwards:

The 31st of December, 1937.

Plaintiff's Exhibit 24, having been admitted in evidence, reads in words and figures as follows:

"P-24".

In the District Court of the Third Judicial District of New Mexico, Within and for the County of Dona Ana.

In the Matter of the Authorization of the Contract between the United States Government and the Elephant Butte Irrigation District, providing for the sale by the District to the United States of the Elephant Butte Dam, project works and water supply for the generation of hydro-electric energy, and providing for the re-adjustment of the construction charge and the extension of the time within which to repay the same and also for the payment in advance of the operation and maintenance charges.

No. 8508.

Final Decree.

This cause coming on to be heard before the Court on the 31st day of December, A. D. 1937, at the hour of 10 o'clock A.M., on said day on the verified pe-

tition filed herein by order of this Court, made and entered herein on the 9th day of November, 1937 directing the publication of notices and the proof of publication of such notices, and it appearing to the Court, pursuant to the order of publication hereinbefore recited, that the Clerk of this Court did heretofore publish a notice of the filing of the petition and such notice having been given and published once each week for four consecutive weeks in newspapers of general circulation published in each county wherein are situated any lands within the said Irrigation District, to-wit: Las Cruces Daily News, a daily newspaper published in the English language in said County of Dona Ana and State of New Mexico, in its issues of November 19th, 1937, November 26th, 1937; December 3rd, 1937; and December 10th, 1937; and in The Sierra County Advocate, a weekly newspaper published in the English language in the County of Sierra and State of New Mexico, in its issues of November 19th, 1937; November 26th, 1937; December 3rd, 1937; and December 10th, 1937; and that said notice was also published in the Spanish language in The Las Cruces Citizen a weekly newspaper published in the County of Dona Ana and State of New Mexico, in its issues of November 18th, 1937; November 25th, 1937; December 2nd, 1937; and December 9th, 1937; that all of the lands embraced in said Irrigation District, lying and being situate within said Counties of Dona Ana and Sierra, and it further appearing that said published notices did set forth and show the time and place fixed in and by the above recited order of this Court for the hearing of said petition, to-wit: December 30th, 1937, at the hour of 10 o'clock A. M., of said day, or as soon thereafter as counsel could be heard, at the Judge's Chambers in the First

National Bank Building, in the Town of Las Cruces, County of Dona Ana and State of New Mexico, and it further set forth and showed the prayer of the petitioning board, to-wit: That the validity of the proceedings recited in said petition for the authorization of the proposed supplementary contract by the Irrigation District with the United States of America be examined, approved and confirmed by this Court, and that the petitioning board might have such other and further relief as to the Court might seem meet and just, and further setting forth that any person or persons interested in the authorization of said proposed supplementary contract with the United States of America, might on or before the day of the date set for the hearing of said petition, to-wit: the 31st day of December, 1937 at the hour of 10 o'clock A. M., of said day, demur to, or answer the said petition; all as shown by the proofs of publication on file in the office of the Clerk of this Court.

And it further appearing in and by the Clerk's certificate of non-appearance that no person or persons have demurred to or answered said petition or otherwise appeared in said petition, it is therefore considered, ordered, adjudgd and decreed that this Court has power and jurisdiction to examine and determine the legality or validity of each and all proceedings for the authorization of said proposed supplementary contract with the United States of America, and has jurisdiction of all persons interested in the authorization of said proposed supplementary contract.

And it is further considered, ordered, adjudged and decreed that the allegations of the petition herein

stand as confessed and the same be and they hereby are taken as true, and now the Court having examined said proceedings and being fully and sufficiently advised in the premises doth make the following findings;

(1.) That the Elephant Butte Irrigation District of New Mexico is a corporation organized and existing under and by virtue of the laws of the State of New Mexico, providing for the organization of Irrigation District for the purpose of cooperating with the Government of the United States under the Federal Reclamation Law and other Federal laws, and that the petitioner is the duly elected and qualified Board of Directors of said District.

(2.) That on the 5th day of October, 1937, said Board of Directors unanimously resolved that the following contract, to-wit:

United States Department of the Interior Bureau of Reclamation, Rio Grande Project, New Mexico-Texas.

W.O. Draft,
August 24, 1937.

Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes.

This Agreement Made this 9th day of November, 1937, under the provisions of the Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto, and especially the statutory pro-

visions (quoted in Article 3 hereof) relating to the Rio Grande project and contained in the Bureau of Reclamation part of the Interior Department Appropriation Act, fiscal year 1938, approved ....., 1937, (Public No. ....., H. R. 6958, 75th Congress), all said acts being hereinafter comprehensively referred to as the Reclamation Law, by and between the United States of America, acting for this purpose by and through ....., Secretary of the Interior, and the Elephant Butte Irrigation District, an irrigation district duly organized and existing under the laws of the State of New Mexico.

Witnesseth That:

Definitions.

Article 2. As used herein the following abbreviated terms mean the terms set out directly thereafter as follows:

United States—United States of America.

Secretary—Secretary of the Interior.

District—Elephant Butte Irrigation District.

Association—Elephant Butte Water Users' Association.

Contract of June 27, 1906 as amended and supplemented—The following contracts between the United States and the Elephant Butte Water Users' Association and the Elephant Butte Irrigation District:

1. Joint contract with the Elephant Butte Water Users' Association and the El Paso Valley Water Users' Association, dated June 27, 1906.

2. Contract with Association, dated July 6, 1917.

3. Joint contract with Association and District, dated June 15, 1918.

4. Contracts with District, dated October 25, 1919; July 1, 1922; February 21, 1924; July 16, 1928; August 20, 1928; and December 20, 1929.

Power Privilege Agreement—Joint contract between the United States, the District and the El Paso County Water Improvement District No. 1, dated May 10, 1928.

Storage System—Elephant Butte Dam and Reservoir and appurtenant works and the Caballo Dam and Reservoir and appurtenant works.

Power System—Power plants, transmission lines, etc., constructed for development of power.

Irrigation and Drainage System—All project works except the Storage and power systems.

Explanatory Recitals.

Article 3. Whereas, the Interior Department Appropriation Act, fiscal year 1938; under the caption "Bureau of Reclamation", contains the following provision in the item for the Rio Grande project, New Mexico—Texas:

"Provided, that the Secretary of the Interior is hereby authorized to enter into a contract with the El Paso County Water Improvement District Numbered 1 and the Elephant Butte Irrigation District of New Mexico by which the districts will be relieved of the obligation of making payment of the construction cost chargeable to the development of power of Elephant Butte Dam in the amount determined as equitable by the Secretary of the Interior in return for the conveyance by the said two districts to the United States of all the district's right, title, interest and estate in the use of said dam and other project works, including the project water supply, for the development of hydroelectric energy: Provided further, That in such contracts it shall be stated that the use of the dam, project works, and water supply for power purposes shall not deplete or interfere with the use thereof for irrigation purposes; Provided further, That the net earnings of the power plant and system belonging to the United States and any other available revenues shall be applied, unil the cost thereof has been met, upon the cost of the power development, including (1) the cost of power facilities, (2) the amount invested as herein authorized, in the cost of Elephant Butte Dam, and (3) the amount invested by the Bureau of Reclamation in Caballo Dam: Provided further, That after the cost of the power development has been met the net earnings of the power plant and system shall be disposed of as Congress may direct.

Article 4. Whereas the District desires to receive (1) the benefits of the provisions of the Interior Department Appropriation Act hereinbefore quoted and also (2) the benefits of the provisions of other acts

of Congress relating to the repayment of charges in return for the conveyance by the District, for itself and the landowners therein, to the United States of all the right, title, interest, and estate of the district and its landowners in the use of said dam and other project works, including the project water supply, for the development of hydroelectric energy.

Now, therefore, in consideration of the covenants herein contained, it is agreed between the parties as follows:

District Relieved of Obligation for Construction Cost Chargeable to Power.

Article 5. The equitable amount of the construction cost of the storage system (exclusive of Caballo Dam and reservoir) chargeable to power development, as determined by the Secretary and accepted by the District, is $4,246,408.39, computed as follows:

Cost of Storage System (Exclusive of Caballo Dam and reservoir)		
Elephant Butte Dam and reservoir	$5,219,663.53	
Related features roads, etc.	26,744.86	
		5,246,408.39
Less—Direct Appropriation (Non-reimbursable) Act of March 4, 1907 (34 Stat., 1357)		1,000,000.00
Balance chargeable to power development		$4,246,408.39

The United States, pursuant to the provisions of the Interior Department Appropriation Act, fiscal year 1938, hereinbefore quoted, will and hereby does relieve the District of 56.7742 per centum of the amount herein fixed as the equitable amount of the construction cost chargeable to power development, or $2,410,-864.39, and will and hereby does reduce the District's obligation for the repayment of its share of the construction cost of the project from $7,920,000, which the District assumed and agreed to pay to the United States under contract of June 27, 1906, as amended and supplemented, to $5,509,135.61.

Operation and Maintenance Cost for Irrigation and Drainage System, Calendar Year 1937, Added to Construction Obligation.

Article 6. The notice issued February 11, 1937, to the District by the Secretary, pursuant to the provisions of the contract of June 27, 1906, as amended and supplemented, announcing the estimated cost of operating and maintaining that portion of the Rio Grande project irrigation and drainage system which is utilized for the benefit of lands within the District for the irrigation season 1937 (calendar year 1937), and requiring the payment of a reservoir or storage charge for certain lands is hereby rescinded. In lieu thereof, the District's share of the cost of operation and maintenance of the irrigation and drainage system (exclusive of the storage system) for the calenday year 1937, estimated at $170,000 will be added to and shall be payable with the reduced construction obligation fixed in article 5 hereof. In the event that the District's share of the actual cost of operation and maintenance during the calendar year 1937 as con-

clusively determined by the Secretary is less than the estimated amount thereof, the excess of estimate over cost will be credited as a reduction of the construction charge installment due and payable by the District to the United States in the calendar year 1938; in the event that the District's share of the actual cost is greater than the estimated amount, he excess of cost over estimate will be added to the construction charge installment due and payable by the District to the United States in the calendar year 1939.

Interest on Construction Charges Deferred under the Act of April 1, 1932, as Amended and Supplemented Added to the Construction Obligation.

Article 7. Pursuant to the acceptance by the District of the Act of April 1, 1932 (47 Stat., 75), as amended and supplemened, extending the time of payment for all or part of construction charge installments for the years 1930 to and including 1936, the District is obligated to pay the United States interest charges in the amount of $21,859.16. The District agrees to pay such interest charges to the United States as hereinafter provided as a part of the adjusted construction charge obligation.

District Assumes Payment of the Adjusted Construction Obligation.

Article 8. The District assumes and agrees to pay the adjusted construction charge obligation of $5,700,985.77, being the total of the items set forth in articles 5, 6, and 7, above. It is understood and agreed that the District has paid to the United States construction

charges aggregating $1,762,473.85, and will on or before the execution by it of this contract pay with accrued penalties the 1936 construction charge installment of $154,800.00 due September 1, 1937, such payment to be made either by cash or by cash and credits. The aggregate amount of $1,917,273.85 Will be applied to the payment of the adjusted construction obligation of $5,700,985.77, and the District agrees to pay the resulting balance of the construction charge obligation, viz., $3,783,711.92 in fifty equal successive semi-annual installments, on March 1, and September 1 of each year commencng with the first payment due and payable March 1, 1938, and ending with the last payment due and payable on September 1, 1962, the installments for 1938 and 1939, however, being subject to possible adjustments as provided in Article 6 hereof.

Segregation of Project Features for Purposes of Operation and Maintenance—1937 and thereafter.

Article 9. The United States will continue the operation and maintenance of the project until otherwise provided. Beginning with the calendar year 1937, the operation and maintenance of the project will be segregated as (a) operation and maintenance of the storage system and power system, and (b) operation and maintenance of the remainder of the project, hereinafter referred to as the irrigation and drainage system.

Operation and Maintenance of Storage System for Delivery of Irrigation Water.

Article 10. For the calendar year 1937, and thereafter during the period of the repayment of the remaining construction obligation of the District as fixed in article 8 hereof, the District will pay to the United States, in lieu of regular operation and maintenance charges for the storage system, and in lieu of the storage water rental charge heretofore collected for lands not designated for payment of construction charges, a reservoir service charge of ten cents (10) cents per acre-foot for each and every acre-foot of water, reasonably necessary for irrigation, made available for the lands of the District at the turnouts of the Elephant Butte Dam, until the Caballo Dam is completed, thenceforth at the turnouts of the Caballo Dam. Because of the requirement for the payment of the reservoir service charge as herein provided, the provisions of the contract between the District and the United States and of the notice of February 11, 1937, given by the First Assistant Secretary to the District, requiring the payment of an annual storage water rental charge for the calendar year 1937 of fifty cents (50 cents) per acre for the total area within the district of lands not designated for commencing payment of construction charges shall be inoperative for the calendar year 1937, and such annual storage rental charges shall not be collected by the United States for subsequent years.

The office of the Bureau of Reclamation in charge of the Rio Grande project will render on or before October 15, 1937, and on or before October 15 of each year thereafter, a statement to the district of the number of acre feet turned out of the reservoir for the lands within the district and the amount due here-

under for the then preceding twelve months, and the district will pay the amount stated in such notice on or before the first day of March following rendition of the statement. Payments for such reservoir service shall continue for each year during the period of re payment of the remaining construction obligation of the District as provided in Article 8 hereof. For the year immediately following the year for which the last installment of the adjusted construction obligation is payable, and for each succeeding year, thereafter, the Secretary will make an equitable determination of the District's share of the estimated cost of operating and maintaining the storage system for irrigation purposes and the amount so determined annually shall be included in and combined with the annual estimate of operation and maintenance of the irrigation and drainage system and shall be due and payable at the same time and in like manner as provided in Article 11 hereof.

Operation and Maintenance for 1938 and Thereafter Payable in Advance.

Article 11. The period during which the United States continues after January 1, 1938, to operate and maintain the Rio Grande project for and within the District, will hereinafter be referred to as the Government maintenance period. The District will, during the Government maintenance period, pay to the United States in advance the estimated cost of operating and maintaining that portion of the project, other than the storage and power systems, which is utilized for the benefit of lands within the District. Such estimated cost for the calendar year 1938 is $175,000, of which the amount of $32,620.00 shall be

due and payable on or before December 15, 1937, and the amount of $81,700.00 thereof shall be due and payable on or before February 15, 1938, and the remainder thereof, in the amount of $60,680.00 shall be due and payable on or before July 15, 1938. Each year thereafter, during the Government maintenance period, the annual estimated cost shall become due and payable in the following manner: On or before September 1, 1938, and on or before September 1 of each subsequent calendar year during the Government maintenance period, the Secretary will notify the District of the amount of the District's proportion of the estimated operation and maintenance cost (including all necessary equipment, materials and supplies, proper overhead and general charges) in operating and maintaining the project works, other than the storage and power systems, during the calendar year next succeeding the year in which the notice is given. Such notice will state the District's share of such estimated cost (a) for the first two months of the calendar year next succeeding, (b) for the five next succeeding months, and (c) for the remaining five months of the calendar year for which notice is given. The amount stated for the first two months of the calendar year shall be due and payable on or before December 15 of the year in which the notice is given; the amount stated for the next succeeding five months shall be due and payable on or before February 15 of the calendar year next succeeding the year in which the notice is given; and the amount stated for the last five months of the calendar year shall be due and payable on or before July 15 of the calendar year next succeeding the year in which the notice is given. As soon as practicable after the close of the calendar year for which notice of the estimated cost of operation and maintenance is given, the District

will be furnished a statement of actual cost of such operation and maintenance and the District's proportionate share thereof, and any excess of payment upon the basis of estimated costs over actual costs shall be credited upon the payment due and payable by the District on July 15 next succeeding such calendar year. If in the opinion of the Secretary the estimate of such operation and maintenance cost appears to be insufficient to meet the actual cost thereof he shall give notice of such threatened deficiency and his estimate of the amount thereof and the District's share thereof, and the District shall pay to the United States its proportion of the amount of such deficiency within 15 days from the date of such notice. Should the District fail to make payment of any operation and maintenance charges at the time and in the manner above provided, the United States will be under no further obligation to deliver water to any land within the District, beyond available funds therefor.

District to Receive Credit for Water Rental Collections From Hudspeth County Conservation and Reclamation District.

Article 12. Pursuant to subsection J of section 4 of the Act of December 5, 1924 (43 Stat., 703), collections of water rental charges under the contract between the United States and the Hudspeth County Conservation and Reclamation District No. 1, dated December 1, 1924, as heretofore or hereafter amended and supplemented, during the calendar year 1937, and annually thereafter, will be credited to the District's obligations as follows: The District's pro rata share thereof as conclusively determined by the Secretary

will be segregated by construction component and operation and maintenance component as also conclusively determined by the Secretary. The construction component will be credited to the payment of the District's construction charge installment next due and payable after the collection of such water rental charge is made from the Hudspeth District, and the operation component will be credited to the payment of the District's operation and maintenance payment next due and payable after the collection of such water rental charge is made from the Hudspeth District.

Irrigation Use of Project Water Supply is Primary Use.

Article 13. In carrying out the provisions of this contract the United States shall operate the Elephant Butte Dam and other power works connected therewith, including the project water supply for power purposes so as not to deplete or interfere with the use thereof for irrigation purposes. The storage works will be operated primarily for irrigation purposes and water is not to be released from Elephant Butte reservoir for the development of power except to the extent that such waer may be retained in he Caballo reservoir until needed and released for irrigation purposes. Water thus intercepted and stored in the Caballo reservoir shall not be released therefrom in excess of releases estimated to be reasonably necessary to meet the requirements for irrigation purposes, for treaty allowances to the Republic of Mexico, as provided in the treaty proclaimed January 16, 1907, and for flood control needs. Nothing in this contract shall ever be construed or interpreted

so as to alter, diminish, or impair the right of project land owners to such water rights as may be or become appurtenant to their lands under the Federal Reclamation Laws and under the original contracts entered into between the original water users' association on this project and the United States.

Designation of Areas Subject to Construction Charges No Longer Necessary.

Article 14. Because of the change in the relations between the District and the United States as herein provided regarding the payment of the adjusted construction charge obligation, the parties hereto hereby rescind to provisions of Article 7 of the contract of June 15, 1918, among the District, the Elephant Butte Water Users' Association, and the District and the United States, so far as said provisions require that, from time to time, as the Secretary may determine that specified areas of irrigable district lands, not necessarily contiguous, should commence the payment of the construction charge of the irrigation works, he shall render a statement to such effect to the district, designating the areas of said district to lands, stating the amount of the construction charge payable for such designaed areas.

Additional Construction Work.

Article 15. The United States will continue with the construction of the irrigation and drainage features of the project, contingent upon appropriations therefor being made available by Congress, to the extent that the District's adjusted construction charge obligation will permit. It is understood that, if for any reason the total construction cost chargeable to

District lands is less than the District's adjusted construction obligation, the District will be relieved of the payment of such excess through a reduction to the extent of such excess of the construction charge installments payable at the end of the repayment period fixed herein, such reductions being applicable on said construction charge installments on the inverse order of due dates.

United States to Perform Work with Contributed Funds.

Article 16. Pursuant to the Act of Congress of March 4, 1921 (41 Stat., 1367, 1404) the United States during the Government maintenance period will perform with funds contributed by the District such betterment or additional maintenance work on the project as may be deemed necessary by the District and approved by the Secretary. Before undertaking any such work the United States will be furnished with the necessary contributed funds, in one or more installments as may be agreed upon, accompanied by a certified copy of a resolution of the board of directors of the District, setting forth the nature of the work desired and authorizing its performance with such contributed funds. Upon the completion of the work so authorized, the District will be furnished with a statement of the cost thereof, and any unexpended balance of such contributed funds will be refunded to the District or applied otherwise as the District may direct.

Cancellation of Power Privilege Agreement.

Article 17. The District and the United States hereby rescind that certain Power Privilege Agreement described in Article 2 hereof.

District Conveys Power Interests.

Article 18. The District for itself, and its water users and land owners and for its and their successors and assigns, does hereby convey, and grant to the United States all of its and their claims of right, title, interest and estate, present and prospective in the use of the Elephant Butte Dam and other project works, including the project water supply for the development of hydroelectric energy by the United States: Provided that the use of said dam, project works and water supply for power purposes shall not deplete or interfere with the use thereof for irrigation purposes: and Provided further, That the net earnings of the power plant and system belonging to the United States and any other available revenues accruing to the United States by reason of Government ownership of the power plant and system shall be applied in accordance with the provisions of the item in the Interior Department Appropriation Act, fiscal year 1938, as set out in Article 3 hereof.

The validity of the conveyance to the United States as contained in this article, is of the essence of this agreement. A contract similar to this (hereinafter referred to as the El Paso contract) is being made coincidently with the El Paso County Water Improvement District No. 1, containing the portion of the Rio Grande Federal Reclamation project that lies in the

State of Texas, and the El Paso contract contains an article similar to Article 18 hereof. Should the conveyance to the United States in Article 18 hereof, or in the similar article of the El Paso contract, ever be held invalid or ineffective in whole or in part, as to either district, or as to any water user or landowner or group of landowners in either or both districts, the Secretary may, by notice to the District, terminate this agreement, whereupon the rights and obligations of the parties hereto shall be reinstated, so far as practicable, as if this agreement had not been made. Any landowner of the district, or any holder of a mortgage or lien upon land in the district, who does not object to the confirmation of this contract by the Courts shall be estopped thereafter to question the validity of his conveyance. Likewise any landowner of the district, or any holder of a mortgage or lien upon land in the district, who accepts the benefits of this agreement in the reduced construction installments permitted hereby, shall be deemed conclusively to have accepted this agreement and to have acceded to the conveyance herein made, so far as his land or interest is concerned.

Agreed Charges A General Obligation of the District.

Article 19. The District is obligated to pay to the United States the full amounts herein agreed upon according to the terms stated, notwithstanding any individual default in the payment of any assessments, tolls or charges levied by the District to secure funds to meet charges due to the United States.

District to Use All Powers to Collect.

Article 20. All construction and operation and maintenance charges due to the United States hereunder shall be paid as required by this contract to the proper fiscal officer of the United States. The amount due the United States shall be a first charge upon the collections of said district. The District agrees that it will cause to be levied and collected all necessary assessments, including a sum to cover (1) any individual collection delinquency for past years and (2) estimated individual collection delinquency for the year for which assessments are being levied, and will use all powers and resources of the District, including the taxing power of the District and the power to withhold delivery of water, to collect and pay to the United States all charges provided for in this contract in full on or before the day that the same become due.

No Water To Be Delivered Without Payment.

Article 21. Pursuant to the provisions of Section 6 of the Act of Congress of August 13, 1914, (38 Stat. 686) no water shall be delivered to or for any tract of land receiving water through the project works, the owner or holder of which shall be in arrears for more than one (1) year for the payment of any charge for operation and maintenance, or any annual construction charge, and penalties, or any assessments levied by the District for the purpose of paying construction or operation and maintenance charges, or who after the beginning of the year 1938 shall fail to pay in advance the annual operation and maintenance charges.

Water Users Accepting Benefits of Contract Estopped.

Article 22. It is understood that the consideration hereof running to the District is the benefit conferred under the provisions of the Act set out in Article 3 hereof and of the Acts of December 5, 1924 and May 25, 1926, and that any land owner or water user of the District who accepts any such benefits under the terms hereof shall be estopped to disclaim any part of the obligation of the district hereunder. If (a) in any Court action at the instance of the District or any of its officers, landowners or water users, this contract or any of its provisions are held to be void, so that in the opinion of the Secretary the contract becomes substantially incapable of performance, or if (b) in any Court action at the instance of El Paso County Water Improvement District No. 1 or of any of its officers, landowners or water users, the El Paso contract, as defined in Article 18 hereof, or any of its provisions are held to be void, so that in the opinion of the Secretary that contract becomes substantially incapable of performance, the District and its landowners or water users shall revert to the terms and conditions of the contract of June 27, 1906, as amended and supplemented with like effect as though this contract had never been executed.

Payment of Interest Charges.

Article 23. Upon every sum of money required to be paid to the United States by this contract and not paid when due, interest at the rate of six (6) per centum shall be added from the due date until the date of payment, and the district hereby agrees to pay such interest.

Secretary Arbiter of Questions of Fact.

Article 24. Whenever in this agreement an estimate or determination of fact is required or any question of fact is left undetermined by the provisions hereof, the Secretary shall make any and all such estimates and determinations of fact and decisions upon any and all questions of fact which may arise hereunder, and the Secretary's estimate, determination or decision thereof or thereon shall be binding and conclusive upon the parties to this agreement.

Access to Books and Records.

Article 25. The proper officers or agents of the District shall have full and free access at all reasonable times to the project account books and official records of the United States relating to the construction, acquisition, care, operation and maintenance of the irrigation and drainage works, with the right at any time during office hours to make copies of, or from, the same or any of them, and the proper representatives of the United States shall have similar rights in respect to the accounts, books and records of the District.

Election and Confirmation.

Article 26. The execution of this contract shall be authorized by the qualified electors of the district at an election held for that purpose and thereafter the District shall prosecute to final decree, proceedings in a Court of competent jurisdiction for the confirmation of this contract. The United States shall not be required to proceed under the terms of this contract

until (1) a confirmatory final judgment in such proceeding shall have been finally rendered, and (2) the El Paso contract shall have been authorized at an election and confirmed by the Courts of the State of Texas. The District shall furnish the United States certified copies of all proceedings relating to said election and confirmation proceedings.

Reversion to Contract of June 27, 1906 as Amended And Supplemented on Failure of This Contract.

Article 27. In the event of a failure of the authorization of this contract at an election called for that purpose or in confirmation proceedings subsequently brought, this contract shall be void and of no effect and the parties hereto shall revert to the contract of June 27, 1906 as amended and supplemented with like effect as though this contract had never been executed.

This contract is also not to become effective for any purpose unless and until the El Paso contract, as defined in Article 18 hereof, is voted and confirmed and becomes effective.

Provisions of the Contracts as Amended and Supplemented Shall Remain Effective.

Article 28. This agreement is supplemental to the contract of June 27, 1906, as amended and supplemented, and it is agreed that the terms and conditions thereof shall remain unaffected by the provisions hereof, except as they are modified by said provisions.

Remedies Saved to the United States.

Article 29. The mention of any remedies of the United States herein or in such contract of June 27, 1906 as amended and supplemented, for breach of any of said contracts shall not be understood to exclude the United States from any other remedy which it may have, and it is further understood that all rights of action for breach of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

Officials Not to Benefit.

Article 30. No member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or any benefit to arise therefrom: Nothing, however, herein contained shall be construed to extend to any incorporated company, if the contract be for the general benefit of such corporation or company.

In Witness Whereof, the parties have hereto subscribed their names the day and year first above written.

THE UNITED STATES OF AMERICA.

By .....

ELEPHANT BUTTE IRRIGATION DISTRICT.

By .....

Attest:

Should be submitted to the qualified voters of said District for their approval and ordered and directed that an election be called and held in said District on the 6th day of November, 1937, at which time there should be submitted to the qualified voters of said District said contract, and making provisions for polling places and the appointment of judges of such election, and the giving of notices thereof in the manner provided by law.

(3.) That the said Board of Directors caused notice of said election so called by it, for the purpose as aforesaid, to be given by posting notices in Spanish and in English in three public places in each election precinct in said district twenty days before the date set for said election, and also for publication of notices as required by law in newspapers of general circulation, printed and published in the Counties of Dona Ana and Sierra, State of New Mexico, to-wit: The Las Cruces Daily News, a newspaper of general circulation, published in Dona Ana County, and published in Spanish in The Las Cruces Citizen, a newspaper of general circulation, published in Dona Ana County, and in the Sierra County Advocate, a newspaper of general circulation published in Sierra County.

That such notices specified the time and places of the holding of said election, to-wit: November 6th, 1937, and submitted to the qualified voters the question whether or not the contract hereinabove set out should be enered into with the United States of America, and stated the amount of money payable to the United States for construction purposes, exclusive of penalties.

(4.) That there is no newspaper published in the Spanish language in either the County of Dona Ana or the County of Sierra.

(5.) That pursuant to said call and notices, an election by the qualified voters of said Irrigation District, was held at the time specified, to-wit: The 6th day of November, 1937, at the various designated polling places within said Irrigation District, for the purpose of determining whether or not the said Irrigation District should enter into the proposed contract above set forth, and due return made thereof; that the Board of Directors, on the 9th day of November, 1937, held a special meeting, duly called and held for the canvassing of returns of said election, canvassed the said returns and thereon found, declared and caused to be entered in the minutes of the Board that there had been 454 votes cast by the qualified voters of said Irrigation District at said election, and that of these, 450 had voted in the affirmative and 4 had voted in the negative; that of the votes cast by the qualified voters in said election, more than two-thirds were in favor of said contract, and that said contract had been authorized and approved by the qualified voters of said Irrigation District.

(6.) That all of the resident free holders and qualified voters within the said Irrigation District had in fact, knowledge of the election for the authorization of said proposed contract, in time, sufficient to enable them to oppose the proposed action of the Board if Directors of the Elephant Butte Irrigation District of New Mexico, if they saw fit to do so.

Conclusions of Law.

(1.) That the notice of the petition hereinabove recited was duly given and published for the time and in the manner as provided by law.

(2.) That no irregularity, error, or omission occurred in the proceedings relating to the authorization of said supplementary contract that would or did in any way affect the substantial or other rights of any party or parties in interest.

(3.) That all of the requirements of law in the matter of the authorization and approval by the qualified electors of said Irrigation District of the proposed contract above set out have been fully and in all respects complied with, and that the petitioner, the Board of Directors of the Elephant Butte Irrigation District, is entitled to a decree, approving all the proceedings with reference to the authorization of said proposed supplementary contract, and declaring said proposed supplementary contract duly authorized by the qualified voters of the Elephant Butte Irrigation District, and that said supplementary contract is a binding and subsisting obligation of the said District.

Wherefore, It Is Therefore Considered, Ordered, Adjudged and Decreed That the proceedings had in the matter of the authorization of said proposed supplementary contract be and they are hereby in all respects ratified, approved and confirmed, and the said proposed supplementary contract above set out and the same is hereby declared to be a binding and subsisting obligation of the Elephant Butte Irrigation District of New Mexico.

Dated at Las Cruces, New Mexico, this the 31st day of December, A. D. 1937.

(S.) EUGENE D. LUJAN,
District Judge of the Seventh Judicial District of N. Mex., sitting by request of Hon. Numa C. Frenger, Judge of the Third Judicial District of N. Mex.

State of New Mexico,
County of Dona Ana. ss.

I, Geraldine S. Mathisen, Clerk of the District Court of the Third Judicial District in and for the county of Dona Ana, State of New Mexico, do hereby certify and attest the foregoing to be a full, true and correct copy of the original Final Decree in Civil Cause No. 8508 entitled: "In the Matter of the Authorization of the Contract between the United States Government and the Elephant Butte Irrigation District, providing for the sale by the District to the United Staes of the Elephant Butte Dam, project works and water supply for the generation of hydro-electric energy, and providing for the readjustment of the construction charge and the extension of the time within which to repay the same and also for the payment in advance of the operation and maintenance charges", filed the 5th day of January, 1938 and thereafter entered in Book 31 at Page 53 of the Records of this said Court and now on file and properly of record in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and annexed the seal of the District Court of the

Third Judicial District in and for the county of Dona Ana, State of New Mexico at Las Cruces, New Mexico this the 8th day of March, A. D. 1954.

(S.) GERALDINE S. MATHISEN,
Clerk of the District Court of the Third Judicial District within and for the County of Dona Ana and State of New Mexico.

(Seal)

State of New Mexico,
County of Dona Ana. ss.

I, W. T. Scoggin, Presiding Judge of the District Court of the Third Judicial District in the State of New Mexico, do hereby certify that Geraldine S. Mathisen is District Court Clerk of the Third Judicial District in and for Dona Ana County, State of New Mexico (which Court is a Court of record, having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said Geraldine S. Mathisen as such officer; that the seal annexed thereto is the seal of the said District Court; that said Geraldine S. Mathisen as such Clerk is the legal custodian of the original records of documents described and referred to in the foregoing certificate is the proper officer to execute the said certificate and attestation, and such attestation is in dur form according to the laws of the State of New Mexico.

In Witness Whereof, I have hereunto set my hand in my official character as such District Judge, at the City of Las Cruces, County and State aforesaid, this the 8th day of March, A. D. 1954.

(S.) W. T. SCOGGIN.
Judge of the District Court of the Third Judicial District, State of New Mexico, in and for the County of Dona Ana.

State of New Mexico,
County of Dona Ana. ss.

I, Geraldine S. Mathisen, District Clerk of the Third Judicial District Court, of the State of New Mexico, in and for the county of Dona Ana, (which is a Court of record, having a seal which is annexed hereto), do hereby certify that W. T. Scoggin, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, District Judge of the Third Judicial District, aforesaid and duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the seal of the District Court, at my office in said Court, this 8th day of March, A. D. 1954.

(S.) GERALDINE S. MATHISEN,
(Seal) District Clerk of the Third Judicial District, State of New Mexico, in and for the County of Dona Ana.

Mr. Edwards:

We next offer document marked Plaintiff's Exhibit No. 25 (Reporter marks same) which is a certified copy of the judgment of the 65th District Court of El Paso County, Texas, in an In Rem. Proceedings No. 19,944, on the docket of that Court, styled "Ex Parte El Paso County Water Improvement District Number One", wherein the Court adjudged that the El Paso County Water Improvement District No. 1 was legally organized and that the contract of January 17, 1920 with the United States of America was valid. The date of this judgment is the 4th of April, 1921.

Mr. Grambling:
No objection.

Plaintiff's Exhibit No. 25, having been admitted in evidence, reads in words and figures as follows:

"P-25".

In the District Court of El Paso County, Texas, 65th Judicial District.

Ex Parte El Paso County Water Improvement District Number One.

No. 19,944 In Rem.

Be It Remembered: That on this 4th day of April, A. D. 1921, the above styled and numbered cause came on for hearing before the Court, and the petitioner appeared by its counsel, and C. M. Cureton, Attorney General of the State of Texas, appeared for the State, in his official capacity as Attorney General, and no jury being demanded, the questions of fact, as well as of law, were submitted to the Court, Judge P. R. Price presiding.

And it appearing to the Court that citation had been duly made and published, in the mode, manner and form, and for the length of time required by law, and the Attorney General of the State having appeared and answered in the proceeding; and it appearing to the Court that no other person had appeared or intervened or participated, or attempted to intervene or participate in said proceeding:

And it further appearing to the Court that the petition and application of El Paso County Water Improvement District Number One, praying for a decree of the Court declaring said District to have been legally established, and declaring that its contract with the United States of America is a legal and binding obligation upon said District, is in all things sufficient in law, and alleges such facts as authorize and empower this Court to enter the decree prayed for;

And it appearing to the Court that notice of the election to incorporate El Paso County Water Improvement District Number One was given as required by law, and that the Clerk of the Commissioners' Court did post copies of the notice of said election in all things in the manner, mode and form and for the length of time required by law, prior to the date on which said election was held;

And it further appearing to the Court that the election to determine whether said El Paso County Water Improvement District Number One should become a conservation and reclamation district, and the order for said election and notice thereof were given and held in all things in the mode, manner and form required by law, and said election was held in conformity to law;

And it further appearing that the ballot used in said election was in due and legal form, and that at said election the requisite majority voted in favor of said District becoming a conservation and reclamation district, and that the affirmative of said proposition was duly and legally carried, canvassed and declared, and that said District did become a con-

servation and reclamation district, and did thereafter continue to act as such;

And it further appearing to the Court that notice of the election held to determine the question of entering into a contract with the United States Government was in all things sufficient, and that same was published in the manner prescribed by law, in a newspaper published in El Paso County, Texas, for three consecutive weeks before the date of said election;

And it further appearing to the Court that the organization of said El Paso County Water Improvement District Number One is in all things valid, and that the contract of said District with the United States of America, for the repayment of the money expended and to be expended in the construction of its irrigation works and system (which contract was authorized and directed to be executed by the Board of Directors, at an election held for that purpose) is in all things in conformity with the law;

And it further appearing to the Court that the Secretary of the Department of the Interior of the United States of America has requested said El Paso County Water Improvement District Number One to bring an action to determine the validity of said contract;

Now, Therefore, it is ordered, adjudged and decreed that the said El Paso County Water Improvement District Number One is a legal and valid conservation and reclamation district, under the laws and the Constitution of the States of Texas relating thereto, and that said contract entered into by and between the United Sates of America, acting for said purpose by John Barton Payne, Secretary of the In-

terior, under the provisions of the Act of Congress, approved June 17, 1902 (32 Stat., 388), and acts amendatory thereof and supplemental thereto, and El Paso County Water Improvement District Number One, a public corporation, duly formed under the laws of the State of Texas, acting by and through its President and Secretary, thereunto duly and legally authorized, which contract is dated the 17th day of January, A. D. 1920, be, and the same is declared to be in all respects a valid contract binding upon said El Paso County Water Improvement District Number One

(S.) P. R. PRICE,
Judge District Court.

State of Texas,
El Paso County.

I, J. C. Orgain, Clerk of the District Courts in and for El Paso County, Texas, Sixty Fifth Judicial District, do hereby certify that the above and foregoing is a true and correct copy of the original judgment rendered in Cause No. 19,944 Styled Ex Parte El Paso County Water Improvement District Number One, as the same appears of record in the minutes of said Court in Volume 4. Page 365.

Given under my hand and seal of said Court, this 12th day of November A. D., 1953.

J. C. ORGAIN,
(Seal) District Court El Paso County, Texas,
By (S.) LUCILLE LEYVA.
Deputy.

Mr. Edwards:

We next offer a document marked "Plaintiff's Exhibit No. 26" (Reporter marks same), which is a certified copy of the judgment of the 41st District Court of El Paso County, Texas, of November 8, 1939, in an In Rem. Proceeding Number 46,742 on the docket of that Court, adjudging the El Paso County Water Improvement District No. 1 after consolidation with the other district to be a valid conservation and reclamation district and that the contract of November 10, 1937 was a valid and binding obligation. (Shows same to opposing counsel.)

Mr. Grambling:

It is all right. No objection.

Plaintiff's Exhibit No. 26, having been received in evidence, reads in words and figures as follows:

"P-26".

In the District Court of El Paso County, Texas, 41st Judicial District.

Ex Parte: El Paso County Water Improvement District Number One.

No. 46,742—In Rem.

Be It Remembered: That on the 8th day of November A. D. 1939, the above styled and numbered cause came on for hearing before the Ciurt, and the petitioner appeared by its counsel, and Gerald C. Mann, Attorney General of the State of Texas, and Robert E. Kepke, James Nowel, and H. Grady Chandler,

Assistant Attorneys General, appeared for the State, in their several official capacities, and no jury being demanded, the questions of fact, as well as of law, were submitted to the Court, Judge David Mulcahy, Presiding.

And it appearing to the Court that citation had been duly made and published, in the mode, manner and form, and for the length of time required by law, and the Attorney General of the State having appeared and answered in the proceedings; and it appearing to the Court that no other person had appeared or intervened or participated, or attempted to intervene or participate in said proceedings;

And it further appearing to the Court that the petition and application of El Paso County Water Improvement District Number One, praying for a decree of the Court, decreeing that the contract in petitioner's original petition set out and contained, between the United States of America, acting by Harold Ickes, Secretary of the Interior thereof, is a legal and binding obligation upon said District, is in all things sufficient in law, and alleges such facts as authorize and empower this Court to enter the decree prayed for;

And it further appearing to the Court that said El Paso County Water Improvement District Number One has been heretofore decreed to constitute a conservation and reclamation district, in accordance with the provisions of the Constitution of the State of Texas and the laws thereof, duly and legally organized, existing and acting thereunder, by a certain decree of the District Court of El Paso County,

Texas, duly entered under date of April 4, A. D. 1921, in a suit entitled "Ex Parte El Paso County Water Improvement District Number One. No. 19,944—In Rem" upon the docket of said Court;

And it appearing to the Court that the boundaries of said El Paso County Water Improvement District Number One have not been changed or altered since the date of the decree of April 4, 1921, above cited;

And it further appearing to the Court that under date of November 10, 1937, said El Paso County Water Improvement District Number One entered into a written contract with the United States of America, acing for the purpose by Harold Ickes, Secretary of the Interior thereof;

And it further appearing to the Court that under date of October 5, 1937, the Board of Directors of El Paso County Water Improvement District Number One ordered an election to be held throughout said District, in accordance with the laws of the State of Texas relating thereto, for the purpose of determining whether said El Paso County Water Improvement District Number One should enter into contract with the United States of America, in accordance with the terms of the contract set out in Petitioner's petition;

And it further appearing to the Court that notice of said election was duly and legally given, in the mode, manner and form prescribed by law;

And it further appearing to the Court that pursuant to said order of election and the notice thereof, the election was held throughout said District, at the

time and in the mode and manner prescribed by said order and notice, and by the laws of the State of Texas;

And it further appearing to the Court that in said election there were cast in favor of the execution of said contract 336 votes; and that at said election there were cast against the execution of said contract 7 votes and that on the 10th day of November, A. D. 1937, the Board of Directors of El Paso County Water Improvement District Number One canvassed the returns of said election and declared the same to have been carried;

And it further appearing to the Court that the Secretary of the Interior of the United States of America requested El Paso County Water Improvement District Number One to bring an action in the District Court of El Paso County, Texas, to determine the validity of said contract between said District and the United States of America;

And it further appearing to the Court that no valid or legal contest, objection or oppisition to the approval and confirmation of said contract had been filed, and that the execution thereof was in the interest of, and was beneficial to said El Paso County Water Improvement District Number One, and the owners of the land in said District, and all other persons interested therein;

Now, Therefore, it is Ordered, Adjudged and Decreed:

That said El Paso County Water Improvement District Number One is a legal and valid conservation

and reclamation district, under the Constitution and the laws of the State of Texas relating thereto, and that said contract entered into by and between the United States of America, acting for said purpose by Harold Ickes, Secretary of the Interior, under the provisions of the Act of Congress approved June 17, 1902, (32 Stat., 388), and acts amendatory thereof and supplemental thereto, and El Paso County Water Improvement District Number One, a public corporation, duly formed under the Constitution and laws of the State of Texas, acting by and through its President and Secretary, thereunto duly and legally authorized, which contract is dated the 10th day of November, A. D 1937, be, and the same is declared to be in all respects a valid contract, binding upon said El Paso County Water Improvement District Number One.

State of Texas,
El Paso County, Texas.

I, J. C. Orgain, Clerk of the District Courts in and for El Paso County, Texas, 41st Judicial District, do hereby certify that the above and foregoing is a true and correct copy of the original judgment rendered in Cause No. 46,742 styled Ex Parte: El Paso County Water Improvement District Number One, as the same appears of record in the minutes of said Court in Volume 26, at Page 109.

Given under my hand and seal of said Court, this 12th day of November A. D., 1953.

J. C. ORGAIN.
Clerk District Court, El Paso County, Texas.
By (S.) LUCILLE LEYVA.
Deputy.

* * * * * * * *

Mr. Edwards then completed the reading of Plaintiff's Exhibit No. 27, which exhibit reads in words and figures as follows:

"P-27".

El Paso, Texas

March 7, 1941

Mr. W. E. Robertson, Chairman
Water Development Commission
El Paso, Texas

Dear Mr. Robertson:

For the files of the City of El Paso there is being transmitted to you herewith a fully executed signed copy of the contract dated February 18, 1941 and titled "Contract to supply water to the City of El Paso for Municipal Purposes" by and between the United States of America, the City of El Paso, Texas and the El Pasi County Water Improvement District No. 1.

There is attached to the contract a certified copy of the resolution adopted by the Board of Directors of the Elephant Butte Irrigation District approving the contract. As requested by you, a copy of the approval of the Under Secretary of the Interior of the form of the contract and authorization for its execution on behalf of the United States by the Project Superintendent is enclosed herewith.

Please furnish this office with a copy of your letter transmitting the contract to the Mayor of the City of El Paso.

Yours very truly,
L. R. FIOCK,
Superintendent.

Enc. Executed copy of contract.
Copy of Under Secretary's approval.

CC—El Paso County Water Improvement Dist. No. 1.

—Elephant Butte Irrigation District
(With executed copy of contract to each)

—Commissioner
—Chief Engineer
—District Counsel

Copy.

116r-1541

United States Department of the Interior
Bureau of Reclamation
Rio Grande Project
New Mexico-Texas

Contract to Supply Water to the City of El Paso for Municipal Purposes.

This contract made this 18th day of February, 1941, in pursuance of the Reclamation Law, between the

United States of America, represented by the officer executing this contract, and the City of El Paso, a municipal corporation organized and existing under and by virtue of the laws of the State of Texas, and the El Paso County Water Improvement District No. 1, a water improvement district and body politic organized and existing under and by virtue of the laws of the State of Texas,

Witnesseth, That:

Definition of Terms.

2. As used herein, unless otherwise indicated, the following abbreviated terms have the respective meanings set out after each term as follows:

(a) United States—United States of America.

(b) Reclamation Law—The Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, and in particular the Act of February 25, 1920 (41 Stat. 451).

(c) Secretary—Secretary of the Interior.

(d) City—The City of El Paso in the County of El Paso in the State of Texas.

(e) District—The El Paso County Water Improvement District No. 1, in the County of El Paso in the State of Texas.

(f) Elephant Butte District—The Elephant Butte Irrigation District, an irrigation district organized and

existing under and by virtue of the laws of the State of New Mexico

(g) Project—The Rio Grande Federal Reclamation project in New Mexico and Texas.

(h) Project Works—Elephant Butte and Caballo dams and reservoirs, ancillary diversion dams, distribution and drainage works and all works constructed by the United States, in whole or in part, pursuant to the Reclamation Law in connection with the project.

(i) District Water Right Lands—Lands, within the boundaries of the District, which are subject to the payment of District assessments for charges, including those made to meet the District's obligations to the United States under existing contracts for the repayment of construction costs.

(j) Acquired Lands—those District water right lands (including the legal and equitable title thereto) which have been or will in the future be acquired by the City.

(k) Water Charges—all District charges, regular or special assessments, and tolls to which District water right lands and the owners thereof are subject.

(l) Year—Calendar year.

(m) Water Year—the period from and including October 1 of any year to and including September 30 of the succeeding year.

(n). Project Superintendent—the superintendent of the project.

(o) City's Superintendent—the superintendent of the City's water department,

(p) Qualified Landowner—an owner of District water right lands, who is (and in case of a proposed transfer to such owner of lands by the City, an owner who upon acquisition of the lands proposed to be transferred to him would be) entitled to receive water from the project supply for such lands under provisions of the Reclamation Law, Rules and Regulations pursuant thereto, and the contracts, authorized thereunder, between the District and the United States.

(q) Manager—the General Manager of the El Paso County Water Improvement District No. 1, or such other officer of the District as may be designated by the Board of Directors of the District to act in the place of the General Manager.

(r) Advance Estimated Charge—the aggregate sum estimated by the Manager as the total amount of water charges, including charges or assessments for construction repayment, reservoir, service, operation and maintenance, additional water, and all other charges or assessments, howsoever designated, applicable in any year to District water right lands, and which would become due and payable the District on account of acquired lands for the water year ending on the following September 30 of such year, if such acquired lands were in private ownership during such water year and were receiving delivery of

three and one-half (3½) acre-feet of water for each acre of such lands.

(s) Actual Charge—the aggregate sum set out in the notice of the Manager as the total amount of water charges, including charges or assessments for construction repayment, reservoir service, operation and maintenance, additional water, and all other charges or assessments, howsoever designated, which, would have become due and payable to the District on account of acquired lands for the water year ending on the preceding September 30, if such acquired lands had remained in private ownership as District water right lands and had received in such water year on account of which such notice is given (a) a quantity of water equal to that delivered to the City during such water year under the provisions of this contract, or (b) no water as to any such water year in which the City shall have been entitled to have received water under the provisions of this contract but in which no water shall have been delivered to the City.

Recitals.

3. Whereas, The United States, pursuant to the Reclamation Law, has constructed and is operating and maintaining the project, including the project works, and

4. Whereas, the District and the Elephant Butte District have heretofore severally contracted with the United States, pursuant to the Reclamation Law, to repay certain project construction costs and to pay in advance certain other costs, and

5. Whereas, the City which now owns and operates a municipal water system, including deep wells, reservoirs and distribution works, needs and desires to procure from the project water supply a supplemental water supply to meet the present and anticipated future needs of the City and its inhabitants; and there is available to the City no practicable source of such supplemental water supply other than the said project water supply; and the delivery of water to the City as herein provided will not be detrimental to the water service for the project or to the rights of any prior appropriator and will be in accordance with the provisions of the Act of February 25, 1920 (41 Stat. 451), and

6. Whereas, the City for the purpose of securing a supplemental municipal water supply from the project water supply without interference to the water supply of other District water right lands, proposes to acquire not to exceed two thousand acres of District water right lands, and desires to receive each year from the project water supply an amount of water not to exceed the amount of water which such acquired lands would be entitled to receive from said water supply for the respective year, if held in private ownership of qualified project landowners, which will in no event be in excess of three and one-half (3½) acre feet of water a year for each acre of such acquired land;

7. Now, Therefore, for and in consideration of the mutual covenants and promises herein contained the parties hereto agree as follows:

City to Provide Diversion Facilities.

8. The City shall provide, without cost to the District or the United States, in such location and in accordance with such plans and specifications and construction practices as may be approved by the Project Superintendent, suitable facilities for diversion of water from the Rio Grande or the project works, and, without cost to the District or the United States, shall maintain the same in a condition satisfactory to the Project Superintendent, throughout the time during which the City may be entitled to receive water delivery hereunder. The City will remove these diversion facilities and restore the project works at the location of such facilities to their former condition within ninety (90) days after the termination, as provided in Article 13 (a) hereof, of the City's right to receive water; provided, however, that if the City should fail so to remove its diversion facilities and so restore the said premises within such 90-day period, the United States, as its option, may do so and the City shall pay to the United States the cost of such removal and restoration within thirty (30) days from receipt of a bill of such cost.

Delivery of Water to City

9. (a) After completion of the City's diversion facilities and subject to the applicable provisions of the Reclamation Law and to compliance with the provisions of this contract, there shall be delivered, in each water year, to the City at the City's diversion facilities a quantity of water not to exceed the lesser of these amounts of water:

(1) the quantity that can be used beneficially for municipal purposes,

(11) the total quantity which, in such water year, the acquired lands hold by the City would have been entitled to receive from the project water supply had they been owned and held by private qualified landowners,

(111) an amount equivalent to three and one-half (3½) acre-feet of water per acre for each acre of acquired land held by the City in such water year.

(b) The water so to be delivered will be delivered upon request of the City's Superintendent in accordance with such detailed schedule of delivery as may be agreed on from time to time between the Project Superintendent and the City's Superintendent: Provided, that in no event shall deliveries be made by the release of stored water from project storage reservoirs except at times when that stored water is being released for irrigation of lands served from a project diversion point in the immediate vicinity of or below the City's point of diversion.

Acquired Lands.

10(a). Before delivery of water to the City as provided in Article 9 hereof and on or before January 31, 1941, in the event the City has acquired lands prior to that date, and thereafter, as to any acquired lands subsequently acquired by the City and within ten (10) days of such subsequent acquisition, the City's Superintendent shall deliver to the Manager

(1) Evidence of the City's ownership of acquired lands.

(2) A power of attorney duly executed on behalf of the City, authorizing the District as attorney in fact for the City to offer for sale, and sell and convey to the highest and best bidder, who shall be a qualified landowner, for cash at public auction after notice of such sale published once a week for three consecutive weeks in a newspaper of general circulation in El Paso County, Texas, any of said lands held by the City after the expiration of ninety (90) days from the effective date of the termination of the City's right to receive water undre the provisions of this agreement as provided for in Article 13 (a) hereof. Such power of attorney shall continue in force from the date of its delivery until the expiration of one year from and after the effective date of such termination of the City's right to receive water: Provided, That notwithstanding such power of attorney, the City may at any time prior to the date of the termination of the City's right to receive water hereunder, convey unconditionally any if the acquired lands to qualified landowners without the execution of additional instruments by the District for the release of the District's power of attorney.

(b) Within ten (10) days from the effective date of any conveyance from the City of any acquired lands the City shall submit to the District Manager evidence of such conveyance, but such disposition of any such acquired land shall not entitle the City to any refund or credit upon any part of any advance estimated charge or actual charge theretofore becoming due from the City when the computation of

such charge included the acquired lands disposed of by the City.

(c) The proceeds from the sale of any land made under the power of attorney provided for in this article shall be applied first to pay the reasonable costs of making such sale and next to the payment to the United States of any amount at the time of such sale remaining due and unpaid to the United States pursuant to this contract, and any amount of such proceeds thereafter remaining shall be paid to the City.

(d) Upon the termination of the City's right to receive water under the provisions of this agreement the City shall offer for sale and endeavor to sell and convey any acquired lands then held by the City to qualified landowners.

(e) No water shall be delivered to acquired lands while the legal and equitable title thereto remains in the City or to any acquired land in any water year when such land was included in the computation of the advance estimated charge or the actual charge for such water year: Provided, That subject to the compliance by the City with the provisions of this contract, including the provisions of Article 11 relating to the payments to be made to the United States, until the City's diversion works and appurtenant structures are completed and in actual operation, water may be delivered to not to exceed one hundred and sixty acres of such acquired land in the same manner and under the terms and conditions, not in conflict with the provisions of this contract, as if said lands were in private ownership of a qualified project landowner.

(f) The City will acquire its lands, only after consultation with the Manager, in a manner and in locations which will not interfere with the efficient operation of the District or materially impair the economic status of any community therein; it being hereby declared to be the intention of the parties hereto that the City will acquire its lands in such a manner as to result in the least practicable disturbance of the economic statute of any community.

(g) Any sale, conveyance or disposition, by the City, of acquired lands shall be only to qualified landowners.

(h) The City shall not acquire or retain title to District water right lands so as to hold, at any time, an aggregate amount thereof in excess of 2,000 acres.

Terms of Payment.

11(a). The City agrees to pay to the United States, at the times and manner as herein provided, the charges provided for in this article.

(b). On or before May 1, 1941, the Manager shall give written notice to the City and the Project Superintendent of the advance estimated charge for the water year ending September 30, 1941, on account of acquired lands, as shown by the records of the Manager, held by the City on the date preceding the date of said notice. The City shall pay to the United States on or before June 1, 1941, an amount equal to this charge.

(c). On or before October 15, 1941, and on or before each October 15 thereafter, the Project Superin-

tendent shall notify the Manager of the amount of water delivered to the City, pursuant to this contract, during the water year ending on the September 30 preceding such notification.

(d). On or before November 1, 1941, and on or before each November 1 thereafter the Manager shall give written notice to the City and to the Project Superintendent which notice shall show:

(1) The actual charge for the respective water year ending on the September 30 preceding such notice The notice of the actual charge shall separately designate the charges or assessments and the respective amounts thereof included in said actual charge.

(2) The advance estimated charge for the current water year (that is the water year enning in the Following September 30) on account of acquired lands, as shown by the records of the Manager, held by the City on the date preceding the date of the notice provided in this subsection of this article.

(e) The amount by which the advance estimated charge, including any supplemental advance estimated charge, paid by the City on account of any water year exceeds the actual charge on account of such water year shall be credited to the advance estimated charge next becoming due from the City to the United States, and the amount by which the actual charge on account of any water year exceeds the advance estimated charge, including any supplemental advance estimated charge, paid by the City on account of such water year shall be added to the advance estimated charge next becoming due to the United States from the City.

(f) On or before December 1, 1941, and on or before each December 1 thereafter the City shall and it hereby agrees to pay to the United States the amount of the advance estimated charge for the water year for which such charge is made, adjusted and provided in subsection (e) of this article.

(g) Within 10 days of receiving evidence of the City's ownership of acquired lands provided for in Article 10 (a) 1 hereof, as to any acquired lands which were not included in the computation of the estimated amount in the preceding notice thereof on account of the water year in which such showing is furnished by the City, the Manager shall give a supplemental written notice to the City and the Project Superintendent of the amount of the advance estimated charge for the then current water year arising by reason of the City's acquisition of such additional acquired lands, and the City shall and it hereby agrees to pay to the United States the amount thereof within fifteen (15) days from the giving of such supplemental written notice as aforesaid.

(h) Upon the termination of this contract, as in Article 13 hereof provided, any excess of the aggregate amount theretofore paid to the United States by the City over and above the aggregate amount, including advance estimated charges, becoming due to the United States pursuant to this contract shall be refunded to the City.

Payments to be Credited to District's Obligations.

12(a). The United States, after receipt of any payment from the City pursuant to this contract, will

cover the amount of such payment into the Reclamation Fund and will credit such payment, in the manner and in the amounts provided herein, upon payments to become due from the District to the United States under existing repayment contracts.

(b) Upon the determination of the actual charge for the water year, on account of which the City has paid any advance estimated charge, or supplemental advance estimated charge, such payment or payments, in a total amount not to exceed said actual charge, shall be credited upon the next installment or payments due from the District to the United States, in accordance with the separate designation of the respective charges, and the respective amounts of each of such charges, as provided in Article 11 (d) (1), as follows:

(1) an amount equal to that designated as "construction charges" shall be credited upon the District's construction charge installment;

(2) an amount equal to that designated as "reservoir service charge" shall be credited upon the District's reservoir service charge,

(3) an amount equal to the sum of the amounts designated respectively as "maintenance and operation charge" and "Special assessment for additional water" shall be credited upon the District's advance operation and maintenance charge;

(4) an amount equal to that in any designation other than those mentioned in subdivisions (1), (2) or (3) of this subsection of this Article shall be

credited in such manner and upon such installments or charges thereafter becoming due to the United States from the District as may be determined by the Commissioner of the Bureau of Reclamation.

(c) If the amount of the payment by the City so to be credited is less than the amount of the actual charge for the water year on account of which such payment was made, then such payment shall be credited upon the next installment or payments due from the District to the United States to the corresponding designations set out in subsection (b) of this Article, the credit to each designated charge to bear the same proportionate relationship to that designated charge as the amount of the payment from the City to be credited bears to the amount of such actual charge.

Termination for Breach

13(a). All rights of the City to have delivered to it pursuant to this contract, or to take or receive any part of the project water supply, shall cease and terminate at the option of the United States upon the expiration of thirty (30) days from notice in writing of the exercise of such option, to be given to the City in the discretion of the Secretary.

(1) Upon failure by the City for a period of twelve (12) months to pay to the United States, after the same shall become due, any amount which may become due from the City to the United States under the provisions of this contract, or

(2) Upon breach by the City of any other of the terms and conditions of this contract, or

(3) Upon the entry of a valid and subsisting order or decree of a Court of competent jurisdiction by which it shall have been held, that the City is without power to perform or contract for the performance of any of the matters and things undertaken by the City under the provisions of this contract or by which this contract shall have been held in whole or in part not to constitute a valid and binding agreement, or

(4) Upon failure of the City, within a period of five years from the effective date of this contract, to have constructed to substantial completion its diversion facilities as in Article 8 hereof provided, together with its water treatment plant for use in connection therewith, or

(5) Upon the failure of the City for one or more periods of any three consecutive years after the expiration of five years from the effective date of this contract to have held acquired lands to the extent of at least 500 acres.

(b) This contract shall terminate in its entirety and shall become of no further force and effect,

(1) at any tme upon the written mutual agreement of the parties hereto, or

(2) whenever, after the termination of the City's right to delivery of water hereunder as provided in subsection (a) of this Article, all acquired lands have been conveyed to qualified project landowners and all amounts then due to the United States under the provisions of this contract have been fully paid by the City.

(c) The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provision hereof or of a further breach of such provision.

Refusal to Deliver Water.

14. In the event that the City fails to pay any amount provided for in this contract when due, the United States may refuse to deliver water to the City until such payment is made. The provisions of this Article are not exclusive and shall not in any manner preclude the United States from exercising any other remedy to enforce collection of payments provided herein.

Measurement of Water.

15. Before delivery of water to the City under the provisions of this contract the City shall, without cost to the United States or to the District, construct in a manner, at a location at the point of delivery of water to the City, in accordance with such plans and specifications as hereafter shall have been approved by the Project Superintendent, an adequate measuring device for the measurement of water delivered to the City undr the provisions of this contract; and the City shall maintain said measuring device in a condition satisfactory to the Project Superintendent. The water which may be delivered to the City pursuant to this contract will be measured by the United States, and such measurements shall control for all purposes of this contract.

Control of Water by the Cty.

16. Upon receiving water delivered to the City pursuant to this contract at the City's point of diversion as herein provided, the City, without cost to the United States or to the District, shall thereafter be responsible for the carriage, storage or distribution of the water so delivered; and the City shall and hereby does assume full responsibility for the control and handling of said water and for any damage for which there is legal liability, including damage, without excluding damage of the same or a different class, arising from personal injury or death that may result therefrom or in connection therewith after its delivery to the City as herein provided, and shall save the United States and the District harmless on account of any such damage.

Neither the United States nor the District Shall be Liable on Account of Shortage or Quality of Water.

17. Neither the United States nor the District shall be liable for damages to the City or its inhabitants or others for failure to supply water under this contract caused by insufficient supply of water in the Rio Grande, hostile diversion, drought, interruption of service made necessary by repairs, or on account of any other delivery of water than that herein stipulated for, directed or ordered to be made, by any valid or subsisting order, or decree of a competent Court or of any other duly constituted, competent authority, or for damages caused by floods, acts of hostility or unavoidable circumstances; or for damages of any character resulting from any lack of

purity or potable quality of the water which may be delivered to the City under the terms of this contract, and the City agrees to hold the United States and the District harmless from any damage or claims of damage arising from said causes.

Statue of Acquired Lands and Existing Contracts to Remain Unaffected.

18. Nothing in this contract, except as herein otherwise expressly provided, shall be construed as altering, modifying or amending existing contracts between the United States and the District. Nothing herein shall be construed as affecting the status of acquired lands as being District water right lands within the project and within the boundaries of the District; and the status of such acquired lands, whenever the same shall have been transferred to private ownership, shall in so far as this contract is concerned, be and remain exactly as though such lands had never been acquired lands.

Peralty for Delinquency.

19. To every sum of money required to be paid to the United States under this contract which shall remain unpaid after the same becomes due there shall be added a penalty of one-half of one percent [illegible] per month of such delinquent sum from and after the date when such sum becomes due and payable, and the City agrees to pay such penalty.

Secretary to Determine Disputed Questions of Fact.

20. In the event of disputes between the parties hereto arising out of this contract involving questions of fact and in so far as the provisions hereof require

a determination of fact to be made, the Secretary is hereby designated as the arbiter of such questions and is the one required to make such determination of facts and his decision thereon shall be conclusive and binding upon the parties hereto.

Successors and Assigns Bound.

21. The provisions of this contract shall apply to and bind the successors and assigns of the respective parties provided, however, that no transfer by the City of any interest in this contract shall be valid until the City has received the written consent thereto of the Secretary or his duly authorized representative and the written consent thereto of the District.

Contingent on Appropriations.

22. Where the operations of this contract extend beyond the current fiscal year it is understood that the contract is made contingent upon Congress making the necessary appropriations for expenditures thereunder after such current year has expired. In case such appropriation as may be necessary to carry out this contract is not made, the City hereby releases the United States and the Distric from all liability due to the failure of Congress to make such appropriation.

Officials not to Benefit

23. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise herefrom, but this restriction shall not be con-

strued to extend to this contract if made with a corporation or company for its general benefit.

In Witness Whereof the parties hereto have signed their names the day and year first above written.

THE UNITED STATES OF AMERICA,
By L. R. FIOCK,
Suprintendent, Bureau of Reclamation.
THE CITY OF EL PASO, TEXAS,
By J. E. ANDERSON,
(Seal) Mayor.

Attest:

W. R. COLLINS,
City Clerk, City of El Paso.
EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1.
By IDUS T. GILLETT,
(Seal) President.

Attest:

K. B. IVEY,
Secretary, El Paso County Water Improvement District No. 1.

Copy.
Resolution.

Resolution of the City Council of The City of El Paso, Duly Adopted at a Regular Meeting of the City Council on February 27, 1941.

Be It Resolved by the City Council of the City of El Paso, Texas;

That that certain contract entitled "Contract to Supply Water to the City of El Paso for Municipal Purposes" by and among the United States of America, the City of El Paso, Texas and El Paso County Water Improvement District No. 1, dated February 18, 1941, having the advance approval as to form by the Secretary of the Interior on February 18, 1941, transmitted to Mr. W. E. Robertson, Chairman, Water Development Commission, El Paso, Texas, by Mr. L. R. Fiock, Superintendent, Rio Grande Project, Bureau of Reclamation, by letter dated February 19, 1941, be, and the same is hereby, approved, and the Mayor of the City of El Paso is hereby authorized and directed to execute said contract or behalf of the City of El Paso and the City Clerk of the City of El Paso is hereby authorized and directed to attest the same on behalf of the City of El Paso.

Passed and Approved this 27th day of February, 1941.

(S.) J. E. ANDERSON,
Mayor.

(Seal)

Attest:

(S.) W. R. COLLINS,
City Clerk.

. . . . . .

State of Texas,
County of El Paso.

I, W. R. Collins, he duly appointed, qualified and acting City Clerk of the City of El Paso, hereby certify that the above and foregoing resolution constitutes a full, true and correct copy of the said resolution duly adopted by the City Council of the City of El Paso, at a regularly held regular meeting of the said City Council on February 27, 1941, as the same is on file and of record in my office in the City Hall.

Witness my hand and official seal this 6th day of March, 1941.

(S.) W. R. COLLINS.
(Seal) City Clerk, City of El Paso.

A Portion of the Minutes of the Meeting of the Board of Directors of El Paso County Water Improvement District Number One Held on March 1, 1941.

Consideration was then given to the proposed contract dated February 18, 1941, between the United States, the City of El Paso and El Paso County Water Improvement District Number One to supply water to the City of El Paso for municipal purposes. Having determined that the amendments and modifications heretofore suggested by the District in connection with this contract have been accepted and incorporated therein, and having been advisd that the Secretary of Interior of the United States has approved the finding made by the Chief Engineer of the Bureau of Reclamation that there is no other practicable source of water supply available to the City of El

Paso, on motion of Mr. Malone, seconded by Mr. Brinnman and carried, the entering into the said contract by the District was authorized, and the President and Secretary were requested to sign their names to the same.

I hereby certify that the above and foregoing is a true and correct copy of the minute adopted by the Board of Directors, in relation to the contract dated February 18, 1941 between the United States, the City of El Paso and El Paso County Water Improvement District Number One, in session on March 1, 1941.

Witness my hand and seal this first day of March, A. D., 1941.

K. B. IVEY,
Secretary, El Paso County
Water Improvement District
Number One.

(Seal)

At a special meeting of the Board of Directors of the Elephant Butte Irrigation District held at Las Cruces on March 3, 1941 it was moved, seconded and voted that there be adopted the following resolution:

Resolution.

Be It Resolved by the Board of Drectors of the Elephant Butte Irrigation District that the proposed contract dated February 18, 1941, approved as to form by the Secretary of the Interior February 18, 1941, as submitted for the approval of this Board with letter dated February 19, 1941, from L. R. Fiock, Superintendent of the Bureau of Reclamation, between the United States and the El Paso County

Water Improvement District No. 1 and the City of El Paso for furnishing a supplemental water supply to said City, be and the same hereby is approved.

Certificate.

I, D. A. Lowry, the undersigned, Secretary of the Elephant Butte Irrigation District, hereby certify that the above and foregoing constitutes a full, true and complete copy of so much of the Minutes of a regularly called, duly held meeting of the Board of Directors of said District at Las Cruces, New Mexico, on the 3 day of March, 1941, as pertains to the Resolution therein set forth and a true copy of said Resolutions as adopted at said meeting.

Witness my hand and official seal this 6th day of March, 1941.

D. A. LOWRY,
Secretary.

(Seal)

. . . . . .

Plaintiff's Exhibit 29, having been received in evidence by the Court, was then read by Mr Scott, in words and figures as follows:

Copy.

"P-29".

El Paso, Texas

January 31, 1945

Hon. J. E. Anderson, Mayor
City of El Paso,
El Paso, Texas.

Mr. John Gregg, Treasurer-Manager
El Paso County Water Improvement
District No. 1
El Paso, Texas
and
Mr. John Gregg, Treasurer Manager
Elephant Butte Irrigation District,
Las Cruces, New Mexico.

Gentlemen:

Transmitted herewith for the files of your respective agency is executed copy of contract 116r-1712, dated December 1, 1944, providing for the supplying of water to the City of El Paso for municipal purpurposes.

Very truly yours,
L. R. FIOCK,
(L. R. Fiock),
Superintendent.

Enc. Executed contract

Copy.

116r-1712.

United States Department of the Interior
Bureau of Reclamation.
Rio Grande Project
New Mexico-Texas

Contract to Supply Water to the City of El Paso for Municipal Purposes.

This Contract, made this 1st day of December 1944 in pursuance of the Reclamation Law, among the United States of America, represented by the officer executing this contract, the City of El Paso, a municipal corporation organized and existing under and by virtue of the laws of the State of Texas, the Elephant Butte Irrigation District, an irrigation district and body politic organized and existing under and by virtue of the laws of the State of New Mexico, and the El Paso County Water Improvement District No. 1, a municipal corporation and body politic organized and existing under and by virtue of the laws of the State of Texas,

Witnesseth That:

Definition of Terms.

2. Unless otherwise indicated, as used herein, the following abbreviated terms have the respective meanings set out opposite thereto as follows:

United States—United States of America.

Reclamation Law—The Act if June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supple-

mentary thereto and in particular the Act of February 1, 1920 (41 Stat. 451), and all rules and regulations pursuant thereto.

Secretary—The Secretary of the Interior of the United States and his duly authorized representative.

City—The City of El Paso in the County of El Paso and in the State of Texas.

Elephant Butte District—The Elephant Butte Irrigation District, and irrigation district in the Counties of Dona Ana and Sierra, and State of New Mexico.

El Paso District—The El Paso County Water Improvement District No. 1, a water improvement district in the County of El Paso and the State of Texas.

Project—The Elephant Butte and Caballo Dams and reservoirs, and [illegible]ary diversion dams, distribution and drainage works and all works constructed by the United States, in whole or in part, pursuant to the Reclamation Law as the Rio Grande Project.

Water Right Lands—Lands within the boundaries of the El Paso District and the Elephant Butte District, which are subject to the payment of district assessments or charges to meet the District's obligations to the United States under existing contracts for the repayment of construction costs.

Acquired Lands—Water right lands (including legal and equitable title thereto) which have been or will in the future be acquired by the City pursuant to this contract for the purposes provided for therein.

Water Charges—All charges of the Elephant Butte District and the El Paso District including regular an special assessments and tolls to which water right lands and qualified landowners are subject.

Water Year—The twelve month's period beginning October 1st of the preceding year and ending September 30th of each year.

Project Superintendent—The Superintendent of the project.

City's Superintendent—The Superintendent of the City Water Department.

Manager—The General Manager of the Elephant Butte District and/or the General Manager of the El Paso District or such other respective officer of such respective districts as may be designated by their respective boards of directors to act in place of the General Manager.

Qualified Landowner—An owner of water right lands who is (and in case of a proposed transfer of lands by the City, a person who upon acquisition of the lands proposed to be transferred to him would be) entitled to receive water from the project water supply for such lands undr the Reclamation Law and contracts executed thereunder by the United States and the Elephant Butte District and the United States and the El Paso District.

El Paso District Contract—That certain contract among the United States, the City, and El Paso District, dated February 18, 1941, which is amended by

the provisions of this contract in so far as they affect the El Paso District.

Recitals.

3. Whereas, the United States, pursuant to the Reclamation Law, has constructed and is operating and maintaining the project, and

4. Whereas, the Elephant Butte District and the El Paso District have heretofore severally contracted with the United States pursuant to the Reclamation Law among other things to repay certain project construction costs and to pay in advance certain other costs, and

5. Whereas, the City which now owns and operated a municipal water system, including deep wells, reservoirs, and distribution works, needs and desires to procure from the project water supply a supplemental water supply to meet the present and anticipated future needs of the City and its inhabitants; and there is available to the City no practicable source of such supplemental water supply other than the said project water supply; and the delivery of water to the City as herein provided will not be detrimental to the water services for the project or to the rights if any prior appropriator and will be in accordance with the provisions of the Act of February 25, 1920 (41 Stat. 451), and

6. Whereas, the City for the purpose of securing a supplemental water supply from the project water supply without interference to the water supply of other water right lands, proposes to acquire not to ex-

ceed 2,000 acres of the Elephant Butte District water right lands, and 2,000 acres of the El Paso District water right lands, and desires to receive each year from the project water supply, an amount of water not to exceed the amount of water which such acquired lands would be entitled to receive from said water supply for the respective year if held in ownership of qualified project landowners which will in no event be in excess of three and one-half (3½) acre feet of water per acre for each acre of such acquired land:

Now, Therefore, for and in consideration of the mutual covenants and premises herein contained, the parties hereto agree as follows:

City to Provide Diversion Facilities.

7. The City shall provide, without cost to either of said Districts, of the United States, in such location and in accordance with such plans and specifications and construction practices as may be approved by the Project Superintendent suitable facilities for diversion of water from the Rio Grande or the project, and, without cost to the District or the United States, shall maintain the same in a condition satisfactory to the Project Superintendent, throughout the time during which the City may be entitled to receive water delivery hereunder. The City will remove these diversion facilities and restore the project works at the location of such facilities to their former conditions within ninety (90) days after the termination, as provided in Article 11 hereof, of the City's right to receive water; provided, however, that if the City should fail so to remove its diversion facilities and so

restore the said premises within such ninety (90) day period, the United States at its option, may do so and the City shall pay to the United States the cost of such removal and restoration within thirty (30) days from receipt of a bill of such cost.

Delivery of Water to City.

8. (a) After the completion of the City's diversion facilities and subject to the applicable provisions of the Reclamation Law and in compliance with the provisions of this contract, there shall be delivered, in each water year, to the City at the City's diversion facilities a quantity of water not to exceed the lesser of these amounts of water:

(1) The quantity that can be used beneficially for municipal purposes.

(2) The total quantity which, in such water year, the acquired lands held by the City would have been entitled to receive from the Project Water supply had they been owned and held by private qualified landowners.

(3) An amount equivalent to three and one-half (3½) acre feet of water per acre for each acre of acquired land held by the City in such water year.

(b) The water so to be delivered will be delivered upon request of the City's Superintendent in accordance with such detailed schedule of delivery as may be agreed on from time to time between the Project Superintendent and the City's Superintendent; Provided: That in no event shall deliveries be made by

the release of stored water from project storage reservoirs except at times when that stored water is being released for irrigation of lands served from a project diversion point in the immediate vicinity of or below the City's point of diversion.

(c) The amount of water so to be delivered shall be allocated proportionately to the acres of water right lands acquired and owned by the City between the Elephant Butte District and the El Paso District, and it shall be conclusively presumed that the City received at its diversion facilities an equal amount of water for each acre of water right land acquired and owned by the City within the Elephant Butte District and the El Paso District.

Acquired Lands.

9. (a) Before delivery of water to the City as provided in Article 8 hereof, and within ten (10) days of the acquisition by the City of any acquired land or within ten (10) days of the date of execution of this contract, in the event the City has acquired any such land prior to that date, the City's Superintendent shall deliver to the Managers of the respective districts

(1) Evidence of the City's ownership of acquired lands within said affected district.

(2) Powers of attorney duly executed on behalf of the City authorizing each, the Elephant Butte District and the El Paso District, as attorneys in fact for the City to offer for sale and sell and convey to the highest bidder, who shall be a qualified landowner,

for cash at public auction after notice of such sale, published once a week for three (3) consecutive weeks, each in a newspaper of general circulation in said Districts, any of said lands held by the City in either of said respective Districts after the expiration of ninety (90) days from the effective date of the termination of the City's right to receive water under the provisions of this agreement as provided for in Articl 11 hereof. Such powers of attorney shall continue in force from the date of their delivery until the expiration of one year from and after the effective date of such termination of the City's right to receive water; Provided: That notwithstanding such powers of attorney, the City may at any time prior to the date of termination of the City's right to receive water hereunder, convey unconditionally any of the acquired lands within either of said districts to qualified landowners without the execution of additional instruments by either of said Districts for the release of said District's respective power of attorney.

(b) Within ten (10) days from the effective date of any conveyance from the City of any acquired lands, the City shall submit to the Manager of the Elephant Butte District or of the El Paso District as the case may be, evidence of such conveyance, but such disposition of any such acquired land shall not entitle the City to any refund or credit upon any part of the water charges theretofore becoming due from the City when the computation of such charge included the acquired lands disposed of by the City.

(c) The proceeds from the sale of any land made under the powers of attorney provided for in this article shall be applied first to pay the reasonable

costs of conducting such sale and next to the payment to the said District in which such lands are located of any amount at the time of such sale remaining due and unpaid to such District pursuant to this contract, and any amount of such proceeds thereafter remaining shall be paid to the City.

(d) Upon the termination of the City's right to receive water under the provisions of this agreement, the City shall offer for sale and endeavor to sell and convey any acquired lands then held by the City to qualified landowners.

(e) No water shall be delivered to acquired lands while the legal and equitable title thereto remains in the City, or to any acquired land in any water year when such land was included in the computation of the water charges for such water year.

(f) The City will acquire its lands only after approval in writing by the respective Managers of the Elephant Butt Dstrict and the El Paso District, of each proposed purchase in such respective Districts in a manner and in locations which will not interfere with the efficient operation of said respective Districts or materially impair the economic statue of any community therein. It being hereby declared to be the intention of the parties hereto that the City will acquire its lands in such a manner as to result in the least practicable disturbance of the economic status of any community, and the City will keep all lands so acquired free from noxious weeds and will prevent any erosion or blowing of sand upon said lands to the extent and in a manner which will not result in injury to adjoining landowners.

(g) Any sale, conveyance or disposition, by the City, of acquired lands shall be only to qualified landowners.

(h) The City shall not acquire or retain title to water right lands so as to hold, at any time, an aggregate amount thereof in excess of 2,000 acres within the Elephant Butte District and an aggregate amount thereof in excess of 2,000 acres within the El Paso District.

Terms of Payment.

10. (a) The City agrees, upon receipt of notice rendered by either or both the Elephant Butte District and the El Paso District, to pay direct to each of said respective Districts all annual assessments, tolls, levies and charges for operation and maintenance, construction, general fund, excess water, reservoir services, and all other tolls and charges levied or assessed by either or both of said respective Districts on the lands within such respective Districts purchased by the City in accordance with this contract.

(b) The assessments, tolls and charges shall be levied and assessed against the acquired lands of the City in the same manner and at the same rates as the same are levied and assessed against all other lands in the respective Districts in which such lands are situated and which are classified for construction charges.

(c) The levying of assessments, tolls and charges by the Elephant Butte District and the payment by

the City of the same shall be in compliance with the Reclamaton Law and the laws of the State of New Mexico governing said District, and the levying of assessments, tolls and charges by the El Paso District and the payment by the City of the same shall be in compliance with the Reclamation Law and the laws of the State of Texas governing the El Paso District.

(d) The Elephant Butte District and the El Paso District will upon the payment of the annual assessments, tolls and charges by the City, pay to the United States in pursuance of existing contracts between each of the respective Districts and the United States, so much thereof as would be payable from collections required of a qualified landowner of such lands classified for construction charges, and said respective Districts will upon such payment authorize the Bureau of Reclamation to deliver water to the City in accordance with the terms of this contract.

Termination for Breach.

11. (a) All rights of the City to have delivered to it pursuant to this contract, or to take or receive any part of the project water supply, shall cease and terminate at the option of the United States upon the expiration of thirty (30) days from notice in writing of the exercise of such option, to be given to the City in the discretion of the Secretary:

(1) Upon the failure by the City to pay any amount which may become due from the City to either the Elephant Butte District or the El Paso District after the same shall become due under the provisions of this contract, or

(2) Upon breach by the City of any other of the terms and conditions of this contract, or

(3) Upon the entry of a valid and subsisting order or decree of a Court of competent jursdiction by which it shall have been held that the City is without power to perform or contract for the performance of any of the matters and things undertaken by the City under the provisions of this contract or by which this contract shall have been held in whole or in part not to constitute a valid and binding agreement, or

(4) Upon the City's failure for one or more periods of any three (3) consecutive years after the expiration of five (5) years from the effective date of this contract, to have held acquired lands to the extent of at least five hundred (500) acres each in the Elephant Butte District and the El Paso District.

(b) This contract shall terminate in its entirety and shall become of no further force and effect:

(1) At any time upon the written mutual agreement of the parties hereto, or

(2) Whenever, after the termnation of the City's right to delivery of water hereunder, as provided in subsection (a) of this article, all acquired lands have been conveyed to qualified project landowners and all amounts then due to the respective Districts under the provisions of this contract have been fully paid by the City.

(c) The waiver of a breach of any of the provisions of this contract shall not be deemed to be a

waiver of any other provisions hereof or of a further breach of such provision.

Refusal to Deliver Water.

12. In the event that the City fails to pay when due any assessment, toll or charge provided in this contract to be paid, the delivery of water to the City under the terms thereof may be refused until such payment or payments are made. The provisions of this article are not exclusive and shall not in any manner preclude the exercise of any other remedy to enforce collection of payments provided for herein.

Measurement of Water.

13. Before delivery of water to the City under the provisions of this contract, the City shall, at its sole cost, construct in a manner, at the location at the point of delivery of water to the City, in accordance with such plans and specifications as shall have been approved by the Project Superintendent, an adequate measuring device for the measurement of water delivered to the City under the provisions of this contract; and the City shall maintain also at its sole cost said measuring device in a condition satisfactory to the Project Superintendent. The water which may be delivered to the City pursuant to this contract will be measured by the United States and such measurement shall control for all purposes of this contract.

Control of Water by the City.

14. Upon receiving water delivered to the City pursuant to this contract at the City's point of di-

version as herein provided, the City shall thereafter at its sole cost be responsible for the carriage, distribution and storage of water so delivered, and the City shall and does hereby assume full responsibility for the control and handling of said water and for any damage for which there is, or may be, a legal liability that may result therefrom or in connection therewith after its delivery to the City as herein provided, and the City shall save the United States and each of said Districts harmless on account of any such damage.

No Liability on Account of Shortage or Quality of Water.

15. Neither the United States nor the Elephant Butte District nor the El Paso District shall be liable for damages to the City or its inhabitants or others for failure to supply water under ths contract caused by insufficient supply of water in the Rio Grande, hostile diversion, drought, interruption of service made necessary by repairs, or on account of any other delivery of water than that herein stipulated for, directed or ordered to be made, by any valid or subsisting order, or decree of a competent Court or of any other duly constituted, competent authority; or for damages caused by floods, acts of hostility or unavoidable circumstances; or for damages of any character resulting from any lack of purity or potable quality of the water which may be delivered to the City under the terms of this contract, and the City agrees to hold the United States and each of said Districts harmless from any damage or claims of damage arising from said causes:

Status of Acquired Lands and Existing Contracts to Remain Unaffected.

16. Nothing in this contract, except as herein otherwise expressly provided, shall be construed as altering, modifying or amending existing contracts between the United States and either of said Districts. Nothing herein shall be construed as affecting the status of acquired lands as being water right lands within the project and within the boundaries of either the Elephant Butte District or of the El Paso District; and the status of such acquired lands, whenever the same shall have been transferred to private ownership, shall in so far as this contract is concerned, be and remain exactly as though such lands had never been acquired lands. It is understood that this contract is amendatory to the El Paso District contract, which shall not be affected by the provisions hereof, except as the same may, by the provisions hereof, be expressly modified.

Secretary to Determine Disputed Questions of Fact.

17. In the event of disputes between the parties hereto arising out of this contract, involving questions of fact, and in so far as the provisions hereof require a determination of fact to be made, the Secretary is hereby designated as the arbiter of such questions and is the one required to make such determination of facts and his decision thereon shall be conclusive and binding upon the parties hereto.

Successors and Assigns Bound.

18. The provisions of this contract shall apply to and bind the successors and assigns of the respective parties; provided, however, that no transfer by the City of any interest in this contract shall be valid until the City has received the written consent thereto of the Secretary or his duly authorized representative and the written consent thereto of each of the said Districts.

Contingent upon Appropriations.

19. Where the operations of this contract extend beyond the current fiscal year, it is understood that the contract is made contingent upon Congress making the necessary appropriations for expenditures thereunder after such current year has expired. In case such appropriation as may be necessary to carry out this contract is not made, the City hereby releases the United States and each of said Districts from all liability due to the failure of Congress to make such appropriation.

Officials Not to Benefit.

20. No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

In Witness Whereof, the parties hereto have signed their names the day and year first above written.

THE UNITED STATES OF AMERICA,
By L. R. FIOCK.

THE CITY OF EL PASO, TEXAS,
By J. E. ANDERSON,
Mayor.

Attest:

W. R. COLLINS,
(Seal) City Clerk.

ELEPHANT BUTTE IRRIGATION DISTRICT,
By W. T. SCOGGIN,
President.

Attest:

F. S. BAMERT,
(Seal) Secretary, Elephant Butte Irrigation District.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
By K. B. IVEY,
President.

Attest:

P. F. BRINKMANN,
(Seal) Secretary, El Paso County Water Improvement District No. 1.

Resolution of the City Council of the City of El Paso, Texas, Duly Adopted at Regular Meeting of the City Council on December 7, 1944.

Be It Resolved by the City Council of the City of El Paso, Texas:

That that certain Contract entitled "Contract to Supply Water to the City of El Paso for Municipal Purposes" by and between the United States of America, the City of El Paso, Texas, the Elephant Butte Irrigation District, and the El Paso County Water Improvement District No. 1, dated December 1, 1944, having the advance approval as to form of the Secretary of the Interior of the United States of America, be, and the same is hereby approved, and the Mayor of the City of El Paso, Texas is hereby authorized and directed to execute said Contract on behalf of the City of El Paso, Texas, and the City Clerk of the City of El Paso, Texas, is hereby authorized and directed to attest the same on behalf of the City of El Paso, Texas.

Passed And Approved this 7th day of December, 1944.

J. E. ANDERSON,
Mayor.

(Seal)

Attest:

W. R. COLLINS,
City Clerk.

A true and correct copy, I do here certify.

W. R. COLLINS,
City Clerk.

Resolution of the Board of Directors of the Elephant Butte Irrigation District of New Mexico, Duly Adopted at the Regular Meeting of the Board on January 2, 1945.

Be It Resolved By The Board of Directors of The Elephant Butte Irrigation District of New Mexico:

That that certain contract entitled "Contract to supply water to the City of El Paso for Municipal Purposes", by and between the United States of America, City of El Paso, Texas the Elephant Butte Irrigation District and the El Paso County Water Improvement District, Number 1, dated December 1st, 1944 was approved in substance by the Board on October 10, 1944, subject to the approval of the Secretary of the Interior, which contract, with minor changes, having the advance approval as to form of the Secretary of the Interior, has been submitted to the Board for final action. The same is hereby approved and the President of the Elephant Butte Irrigation District of New Mexico is hereby authorized and directed to execute said contract on behalf of the Elephant Butte Irrigation District of New Mexico, and the Secretary of said Board is hereby authorized and directed to attest on behalf of the Elephant Butte Irrigation District of New Mexico.

Passed and approved this the 2nd day of January, 1945.

W. T. SCOGGIN,
(W. T. Scoggin),
President.

(Seal)

Attest:

F. S. BAMERT,
Secretary.

A true and correct copy I do here certify.
F. S. BAMERT,
Secretary.

Next was considered the proposed contract among the United States, the City of El Paso, Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1, dated December 1, 1944, No. 116r-1712, providing for water supply to the City of El Paso for municipal purposes from Rio Grande Project source. On motion of Mr. Summers, seconded by Mr. McComas and carried the said contract was approved and the President and Secretary were authorized to sign and attest the same on behalf of the District.

The above and foregoing is a true and correct copy of a portion of the minutes of the meeting of the Board of Directors of El Paso County Water Improvement District No. 1, held on January 2, 1945.

Witness my hand and seal this 5th day of January, 1945.

MARY JANE BRYANT,
(Mary Jane Bryant),
Assistant Secretary El Paso
County Water Improve-
ment District No. 1.

(Seal)

• • • • • • • •

Plaintiff's Exhibit No. 31, having been admitted in evidence by the Court, and consisting of several documents, reads in words and figures as follows:

"P-31".

State of Texas,
County of Travis.

I,—Audrey Strandtman, Secretary of the Board of Water Engineers for the State of Texas, do hereby certify the attached to be true and correct photostats of the following:

Application No. 1584 filed with the Board of Water Engineers on November 1, 1948, by Dan R. Ponder, Mayor of the City of El Paso, Texas, now on file in the name of the City of El Paso, El Paso, Texas. Protest of El Paso County Water Improvement District No. 1, by P. F. Brinkman, President, and of the United States of America, by L. R. Fiock, Project Manager, Rio Grande Project, to the granting of Application No. 1584.

Protest of R. C. Ivey, et al.; to the application of City of El Paso, Texas, dated December 10, 1948.

Protest of Fort Quitman Land Company and Jones, Hardie, Grambling and Howell, El Paso, Texas, dated December 11, 1948, to the application of the City of El Paso, Texas.

Stipulation and agreement of the City of El Paso, Texas, dated December 1, 1949, with Exhibits "A" through "F" attached thereto. Received by the Board of Water Engineers January 23, 1950. Permit No. 1535

issued by the Board of Water Engineers to the City of El Paso, Texas on May 10, 1950.

as same appear of record and on file in the office of the Board of Water Engineers of the State of Texas.

Given under my hand and seal of the Board of Water Engineers of Texas this the 16th day of April, A. D. 1952.

(S.) AUDREY STRANDTMAN,
(Audrey Strandtman),
Sec. Board Of Water Engineers.

No. 1584.

Application for Permit to Appropriate, Store and Divert Certain Waters of the Unappropriated Waters of the State of Texas.

The State of Texas,
County of El Paso.

To the Board of Water Engineers for the State of Texas:

1. The undersigned, Dan R. Ponder, Mayor of the City of El Paso, El Paso County, Texas, being duly sworn, deposes and says that the City of El Paso, Texas, a municipal corporation of the State of Texas, whose post office address is City Hall, El Paso, Texas, desires to appropriate 27,000 acre-feet of water per annum of the unappropriated storm and flood waters of the State of Texas, and the unused return flow water of the Rio Grande Project of the Bureau

of Reclamation of the Department of the Interior, for municipal and domestic use, from the Rio Grande in El Paso County, Texas.

2. It is proposed to impound 16,000 acre-feet per annum of said 27,000 acre-feet per annum in a storage reservoir hereinafter described, and to divert, in addition to said 16,000 acre-feet which will be impounded, an additional 11,000 acre-feet by direct diversion of return and flood waters without the use of storage.

3. The waters to be impounded will be diverted from the Rio Grande into the proposed reservoir, situated about 13.8 miles upstream from the American Dam, said reservoir to be located on the west side of the Rio Grande. The northeast corner of said reservoir, which point is also the location of the reservoir intake, is located at a point which bears North seventy-seven degrees, fifty minutes East, (N. 77 50'E.), five thousand five hundred thirty-nine feet (5539.0) from monument No. 34 of the Texas-New Mexico State Line, on the right or west bank of the Rio Grande in El Paso County, Texas, and the said point is also up-stream, or north 1.36 miles distant from the Canutillo Bridge, and, as above stated, 13.8 miles upstream from the American Dam. (See Sheet No. 2 of the plans submitted herewith). The American Dam is located in the Rio Grande 100 feet north, or upstream, from the point of intersection of the International Boundary between Mexico and the United States with the Rio Grande. The west end of the American Dam is in New Mexico and the east end is in Texas. Water from said reservoir will be released from time to time back into the Rio Grande,

and such water, together with other water under this appropriation, will be diverted for use by the City as follows: Part of said water will be diverted from the Rio Grande at the American Diversion Dam on the Rio Grande above El Paso, and conveyed through the American Irrigation Canal and the Franklin Canal to the City's water treating plant, where it will be re-diverted from the canal to the plant. A part of said water will be diverted from the Rio Grande at the water treating plant. The reservoir above referred to will have a capacity of 3,000 acre-feet and will be filled by diversion from the Rio Grande during times of flood and other excess flows. Water stored in the reservoir will be released into the Rio Grande as needed by the City, and will be diverted into the treating plant at the diversion point above mentioned.

4. The detailed description of the works proposed to be installed is as follows:

Under the proposed plan of development of the project, water will be diverted from the Rio Grande at thre points: (a), at the American Dam; (b), at the City of El Paso Water Treatment Plant which is located between the Santa Fe Railway Yards and the Rio Grande at the approximate intersection of Anthony and S. Third Streets extended; and (c), at the north end of the proposed storage reservoir, the point of diversion being approximately 1.36 miles north or upstream from the Canutillo Bridge. (See map marked Exhibit A, attached.)

At the City Water Treatment Plant the diversion of water will be accomplished in two ways, or by two

methods, depending upon conditions and circumstances at the time diversion is made. If the American Irrigation Canal and the Franklin Canal are in operation, water will be diverted directly from the Franklin Canal into the Water Treatment Plant intake. If water is not being diverted at the American Dam, and the canals are not in operation, then water will be diverted from the Rio Grande by means of an infiltration gallery constructed in the bed of the Rio Grande and extending from the American bank to the center line of the river, and diversion will be made by the infiltration gallery only at such times as the canals are not in service. The end of the infiltration gallery will terminate in a reinforced concrete pump sump from which the water will be pumped through a pipeline extending across the Franklin Canal and supported by a structure and terminating in the Water Treatment Plant intake structure. The general plan and layout of the works composing this point of diversion are shown upon sheet No. 3 which accompanies this application.

(a) The Dam forming the reservoir will be constructed of rolled and compacted earth fill obtained from borrow. The inside face of the Dam or embankment will be protected and reinforced with a gravel blanket upon which will be placed rock rip-rap filled with gravel. The average height of the embankment will be approximately thirteen feet (13); and the length seventeen thousand feet (17,000). The average bottom width of the embankment will be one hundred and three feet (103), crown width twelve feet (12), inside slope 4:1, outside slope 3:1. (See typical section sheet No. 2 accompanying plans.)

(b) The average width of the reservoir is 2650 feet, length of impounded water 4500 feet, average depth of stored water 11 feet, maximum reservoir storage capacity 130,680,000 cu. ft. or 3000 acre-feet. (See Sheet No. 1, accompanying plans.)

Diversion of water from the Rio Grande for storage in the proposed reservoir will be accomplished over a skimming weir to be constructed on the west side of the Rio Grande and forming the intake of the proposed pumping plant. In all cases, water will reach the proposed storage reservoir through pumps, the average pumping lift being about five feet. Water in storage will be released from the proposed reservoir at the southeast corner of such reservoir into the Rio Grande and will flow down the Rio Grande to the American Dam where it will be diverted into the Franklin Canal and again diverted from the Franklin Canal into the intake structure of the City's Water Treatment Plant. If water released from the proposed storage reservoir is not diverted into the Franklin Canal at the American Dam, it will then be permitted to flow past the American Dam down the river to a point opposite the City Water Treatment Plant where it will be diverted by means of the proposed infiltration gallery and pumped into the intake structure of the Water Treatment Plant, as above described. (See Exhibit A, attached, and Sheet No. 3 of accompanying plans.)

5. The water for the use of which this application is made will be treated and used for domestic, industrial and municipal purposes within the City of El Paso, the approximate areas of which is 39 square miles, and within which area resides a population of approximately 200,000

6. Portions of the waters covered by this application, together with other waters of the City of El Paso derived from other sources, will be returned to the river through the City's sewage treatment plant located on the north side of the river at a point in the southeast corner of the corporate limits of the City of El Paso, immediately south of Washington Park, the said point being one thousand five hundred feet downstream from the intersection of Boone Avenue and the Rio Grande. This water, however, is subject to additional uses by the City before being returned to the stream.

7. The foregoing detailed statements are further delineated and described on the maps, plats, profiles and drawings submittd with the application.

8. If a permit for the appropriation is granted, either in whole or in part, construction work will be begun within 360 days after such permit is issued, except as such time may be extended by the Board.

9. The proposed work will be prosecuted with diligence and will be sufficiently completed so that the application of the appropriated water to the proposed use will be made within 24 months from date of issuance of permit, except as this time may be extended by the Board.

Witness my hand at El Paso, Texas, in my official capacity as Mayor of the City of El Paso, Texas and on behalf of said City, this the 23rd day of Sept., A.D. 1948.

(S.) DAN R. PONDER,
Mayor, City of El Paso, Tex.

Attest:

(S.) W. R. COLLINS,
City Clerk.

Subscribed and sworn to before me, a Notary Public in and for El Paso County, Texas, by the said Dan R. Ponder, Mayor of the City of El Paso, Texas this the 23rd day of Sept., A.D. 1948.

(S.) G. R. DANIELS,
Notary Public, El Paso
County, Texas.

My Commission expires May 31, 1949.

G. R. DANIELS,
Notary Public, in and for El
Paso County, Texas.

My commission expires June 1, 1949.

Office Record.

Received Oct. 6, 1948. Total Fees $1,573.65.

Ordered filed Nov. 1, 1948.

Hearing set for Dec. 13, 1948.

Secretary A. W. McDonald.

Resolution.

Be It Resolved By the City Council of the City of El Paso:

That the Application for Permit to Appropriate, Store and Divert Certain Waters of the Unappropriated Waters of the State of Texas, as recommended by the Water Board be approved, and the Mayor be authorized to sign the same; and that the Water

Board and the Superintendent of the Department of Water and Sewerage be authorized to present the application and date in support thereof to the Texas Board of Water Engineers.

Adopted this the 23rd day of Sept., 1948.

(S.) DAN R. PONDER,
Mayor.

Attest:

(S.) W. R. COLLINS,
City Clerk.

The Honorable,
Board of Water Engineers,
State of Texas,
Austin, Texas.

Gentlemen:

The undersigned acknowledge receipt of a copy of notice of hearing issued by your Board (No. 1584), dated November 1, 1948, giving notice of a hearing to be held in your office on December 13, 1948, on the application of the City of El Paso made to your Board for a permit to appropriate certain quantities of what the City states in its application are unappropriated waters of the Rio Grande River in the State of Texas, such waters to be used by the City for domestic and industrial purposes.

This protest is filed without waiving any of the rights of the United States or of water users and land owners on the Rio Grande Project in order to call to the attention of your Board and your applicant rights to the use of water from the identical source, already under appropriation and dedicated to beneficial

use in the irrigation of lands on the Rio Grande Project in New Mexico and Texas, and in fulfillment of the requirements of a treaty between the United States and the Republic of Mexico; to the probable lack of water in the River below the Texas-New Mexico line, subject to appropriation; to lawful existing rights to appropriate and use such waters under laws of the State of Texas, and to the conflict of interest between existing rights thus claimed and rights that may be claimed under any permit it is now proposed shall issue from your Board to the City of El Paso.

The Rio Grande Project is a Federal Reclamation Project constructed, operated and maintained in pursuance of the provisions of the Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto. The gross project area proper comprises approximately 102,000 acres in the State of New Mexico and approximately 76,000 acres in the State of Texas, exclusive of rights of way, such areas in New Mexico being organized under the laws of that State into a municipal corporation named the Elephant Butte Irrigation District, and the area in Texas being organized under the laws of this State into a municipal corporation named the El Paso County Water Improvement District No. 1. In addition to the project proper, the United States in pursuance of the federal reclamation laws has contracted to supply certain areas with water for beneficial use, namely, lands of the Hudspeth County Conservation and Reclamation District No. 1, comprising approximately 20,000 acres, which lands lie marginal to the Rio Grande below the lands of the project proper. The project lands form an area approximately

175 miles long and 5 miles wide, extending marginal to the river from near Caballo Reservoir to the termination of the Tornillo Canal below El Paso. This area is divided into three valleys separated by river canyon sections about 6 miles long.

The Project works consist of the Elephant Butte Dam and Reservoir, the Caballo Dam and Reservoir, numerous diversion dams in the Rio Grande, and distribution and drainage works all constructed at a cost of approximaely $23,000,000 and now operated for the distribution of waters from the Rio Grande, both natural flow and storage in said Elephant Butte and Caballo Reservoirs, to meet treaty requirements with the Republic of Mexico for the irrigation of approximately 25,000 acres of land in that country, and for the distribution, use, drainage, collection, redistribution and reuse of so-called return flow or drainage waters for use on project lands, including lands under Warren Act contract, in the Hudspeth County Conservation and Reclamation District No. 1.

The construction, operation and maintenance of this project by the United States was invited on the part of the State of Texas, by the enactment of Articles 7653, 7657, 7587, 7588, 7794(b), 7807(d)6, and 7880-53, Vernon's Civil Statutes, and on the part of the State of New Mexico by like statutes enacted by the Legislature of that State.

The project proper is superimposed on what were formerly scattered irrigated areas in New Mexico and Texas which under irrigation by so-called community ditches carrying appropriated waters from the Rio Grande, had applied the same to beneficial use

for a long term of years, prior to the initiation of the federal reclamation project.

In constructing, operating and maintaining the Rio Grande Project the Secretary of the Interior as administrator of the federal reclamation laws acted in conformity with the provisions of the Act of June 17, 1902, Section 8 of which reads as follows:

"Irrigation laws of States and Territories not affected—Interstate streams—Water rights. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right." (32 Stat. 390.)

Acting in pursuance of the said federal reclamation laws and the laws of the Territory of New Mexico and later the laws of the State of New Mexico, the Secretary of the Interior through his duly authorized agent on January 25, 1906, and by supplemental notice in April 1908 withdrew all of the unappropriated waters of the Rio Grande and its tributaries in New

Mexico for direct diversion, and for storage and diversion and irrigation use, the diversion being accomplished by means of diversion dams in the Rio Grande in New Mexico and Texas for distribution and use upon project lands to which such rights of use are appurtenant, and continously for a period of over 40 years (since 1906), the United States has been diverting water directly from the Rio Grande at project diversion works in the Rio Grande, and distributing the same for use upon the project lands, and lands in Mexico in pursuance of treaty, and has been storing said waters so withdrawn in its storage reservoirs for later release and diversion at its said diversion points and distribution for use in irrigation upon said project lands, and to said lands in Mexico.

In connection with its said withdrawal, appropriation and distribution for beneficial use of said waters so diverted, stored and rediverted, the United States as a part of its distribution system for its Rio Grande Project and in accordance with the laws of the States of New Mexico and Texas; and particularly Articles 7547 and 7548, Vernon's Civil Statutes, has used the bed of the Rio Grande for the purposes of carriage, diversion for distribution and use upon its project lands and for the recapture of drainage or so-called return flow, from the irrigation of a part of the said project lands for use upon lands of lower elevation in said project in both New Mexico and Texas.

Prior to the initiation of the Rio Grande Project and amendment of the Texas laws relative to the appropriation of flood and storm waters of the streams of the State, and the creation of the State Board of Water Engineers, there was appropriated under the

then laws of the State of Texas passed by the Legislature of the State of Texas and approved March 19, 1889 (General Laws of the Legislature, pages 101, 102 and 103) 333 cubic feet per second of the unappropriated flood and storm waters of the Rio Grande for diversion and carriage through a community ditch known as the El Paso Irrigation Canal, but now known as the Franklin Canal, title to which is now in the United States and is a part of the irrigation works employed for use and benefit of the Rio Grande Project.

The appropriations so made and rights thereunder were on the construction of the Rio Grande Project duly assigned to the United States as a part of the said project rights, and in pursuance of Chapter 171 of the General Laws of Texas, 33rd Regular Session of the Legislature, a certified copy of the original notice of such appropriation as filed for record July 8, 1889, in the office of the County Clerk of El Paso County, Texas, was duly filed in the office of the State Board of Water Engineers, as will appear from the sworn statement of L. M. Lawson, then Project Manager of the Rio Grande Project, dated May 18, 1914, set out herein at length as follows:

"For the purpose of information and in compliance with the provisions of Chapter 171, General Laws of the State of Texas, 33rd Regular Session of the Legislature, so far as may be, but without waiving any rights of the United States, or its successors in control of any of the works hereinafter mentioned, by reason of this compliance with said provisions, this statement is made by and on behalf of the United States of America, that is to say—

"1. There is hereto attached, marked Exhibit 1, a certified copy of the statements heretofore filed for record in the office of the County Clerk of the County of El Paso, Texas, attached to which is a true copy of the map attached to the original statement filed as aforesaid.

"2. That the said 'El Paso Irrigation Canal' and system as now constructed consists of 30 miles of main canal, main headgate or intake, desaguas, checks, headgates for deliveries to laterals, drops, etc., and that all of the works have been completed. Said canal and system is now owned by the United States of America; has been by the United States altered, enlarged and repaired as shown on map hereto attached, marked Exhibit 2; and is now known as the Franklin Canal and system of the Rio Grande Project.

"3. That all portions of said works are in use and no part of said works is in possession of the United States and not in actual use.

"4. That the amount and volume of water actually taken, diverted or used through said works is 150 second-feet, diverted through the irrigation season from February 15 to October 15 of each year whenever that amount of water is available in the river. That said water so taken and diverted is used principally for irrigation, a small portion thereof is used for domestic purposes.

"5. That the amount of water that has been diverted, taken and used in each year since the acquisition and ownership of said canal by the United States, has

been approximately 70,000 acre-feet per annum and the same has been diverted, taken and used for the purposes as above mentioned.

"6. That there is hereto attached, marked Exhibit 3 a list, giving, as near as may be, the description and area of the lands heretofore and now being irrigated from said canal and system, and the number and names of the water users and consumers of water during said period.

"7. That the local address of the officer in charge of said project is L. M. Lawson, Project Manager, United States Reclamation Service, El Paso, Texas."

The appropriation so made and so recorded with the County Clerk of the County of El Paso, Texas, and a certified copy thereof filed with the State Board of Water Engineers is a valid and existing appropriation of the appropriable flood and storm waters of the Rio Grande in the State of Texas, for irrigation use and benefit of, and appurtenant to, lands of the Rio Grande Project.

In addition to this certified record of water rights filed with the State Board of Water Engineers, for the said Franklin Canal as a part of the Rio Grande Project, the following appropriations have also been made under the laws of the State of Texas, from the unappropriated storm and flood waters of the Rio Grande in Texas, above Ft. Quitman, under applications duly made to the said State Board of Water Engineers and permits duly issued thereunder, as follows:

App. No. Date app: —filed	Name Permit No. Date issued	Stream—County Acre feet per year Maximum rate of del.
194 Apr. 2, 1917	Hoover, Ivey & Schuster 192 Sept. 4, 1917	Rio Grande—El Paso County 2,220 ac. ft. Per Year for 740 acres Maximum 25 C.F.S.
288 March 16, 1918	L. R. Allison 270 Aug. 20, 1918	Rio Grande—El Paso ounty 6000 ac. ft. per year for 2000 acres Maximum 60 c.f.s Above Ft. Quitman
306 Mar. 30, 1918	H. W. Elam, et al 293 Sept. 24, 1918	Rio Grande—El Paso County 1899 ac. ft. er yr. for 633.2 acres Maximum 10 C.F.S. (Known as Elam Ditch)
814 Jan. 28, 1924	Ft. Quitman Land Co. 776 Sept. 30, 1924	Rio Grande—Hudspeth Co. (Above 800 ac. ft. per yr. for 400 a. Ft. Quitman) Restricted to a 2 acre—feet per acre actually irrigated.

App. No. Date app. filed	Name Permit No. Date issued	Stream—County Acre feet per year Maximum rate of del.
244 Nov. 22, 1917	Hudspeth Co., C&R Dist. No. 1 236 Sept. 11, 1918	Rio Grande—El Paso & Hudspeth Cos. 27,000 ac. ft. per yr. for 9000 acres Maximum 400 c.f.s. (Permit issued to Rio Grande Valley Farms Co. Above Ft. Quitman)
1240 Sept. 19, 1930	Robt. & Chas. Dees 1164. Oct. 20, 1931	Campbell Draw—Hudspeth Co. 200 ac. ft. per yr. for 100 acres. Maximum not stated. Includes reservoir of 500 acre feet.

Permit No. 236 of the Texas State Board of Water Engineers issued under date of September 11, 1918, taken in the name of Rio Grande Valley Farms Company, and all rights thereunder, were duly assigned to the Hudspeth County Water Conservation and Reclamation District No. 1, as appears from the records of your Board, and the same were in turn assigned by said last mentioned district to the United States for beneficial use on lands of the Rio Grande Project proper and lands in said assignor district by contract of December 1, 1924, between that District and the United States of America, and by the provisions of said contract there were duly relinquished and assigned all right, title, interest and claim of said District in the same to the United States, and said district accepted in lieu thereof and in consideration therefor, the obligation of the United States to make available to the said District from return flow, waters of the Rio Grande Project, at the lower end of, and below the works of the Project proper, for use in the irrigation of not to exceed 20,014 acres in said District. Said contract was made and entered into in pursuance of the Federal Reclamation laws, particularly the Act of February 21, 1911, and said district was further empowered to enter into said contract in pursuance of laws of the State of Texas. Said contract is still in full force and effect and constitutes an obligation of the United States to make deliveries of water thereunder to the said District, and of the said District to make payments to the United States in pursuance of the terms of said contract.

With respect to the remaining permits so issued by the Texas State Board of Water Engineers as hereinabove described, so far as the records of said Board

indicate, no action has been taken thereon to forfeit or cancel the same, or the rights to the use of flood and storm waters of the Rio Grande in Texas above Fort Quitman evidenced thereby.

Further limiting appropriable waters in the Rio Grande in Texas is the Rio Grande Compact among the States of Colorado, New Mexico and Texas, approved by Congress by Act of May 31, 1939 (53 Stat. 785).

The Rio Grande is a stream in which flood and storm waters are available only during short intervals, over long and irregularly intermittent periods of time. If there be any flood and storm waters originating therein below the New Mexico-Texas boundary line and under the jurisdiction of your Board, not already appropriated and placed to beneficial use for the Rio Grande Project, and on lands in Mexico in pursuance of treaty, such waters are believed inadequate to fill any appropriation applied for by the City of El Paso.

According to the application filed by the City of El Paso with your Board, it is proposed to perfect the water right by permit so applied for by the use of works of the Rio Grande Project, title to which is in the name of the United States, for use and benefit of the project lands, namely, the said Franklin Canal and project drainage works in the proposed reservoir site of the City of El Paso, and no agreement has been reached between the City of El Paso and the United States for use of all or any part of said works by the City of El Paso in so perfecting its water rights so applied for.

The application of the City of El Paso proposes to make diversions from the Rio Grande above diversion works of the United States for the Rio Grande Project, and there is no provision of law for administration of relative rights to the use of water granted by permits issued by your Board, so that without such provision of law or agreement between the United States and the City of El Paso with respect to the employment of a water master to determine the relative rights of the Project under its appropriations herein mentioned, and rights claimed by the City under its permit so applied for will result in endless controversy between the City of El Paso and water users on the Rio Grande Project, as to whether or not waters which the City is proposing to appropriate and use under its application now pending, are unappropriated waters subject to your jurisdiction and permits issued thereunder, or are waters appropriated and long diverted and placed to beneficial use on lands of the Rio Grande Project, or for use of land in Mexico under the aforementioned treaty.

It is therefore respectfully submitted to the Board.

(a) That there are no unappropriated waters in the Rio Grande subject to appropriation by the City of El Paso;

(b) That the proposed use by the City conflicts with the existing water right appropriated by the United States for and on behalf of the lands of the Rio Grande Project, which are now and long since have been applying said waters to beneficial use, and on behalf of lands in Mexico, rights to which are in pursuance of an existing treaty between the United States and the Republic of Mexico;

(c) That the granting of a permit under the application made by the City without any contract or other means of determining relative rights of the City and those of the Rio Grande Project water users and of the Hudspeth County Water Conservation and Reclamation District No. 1 under Warren Act contract with the United States, and water users of Mexico under treaty between the United States and the Republic of Mexico, and of other inchoate rights in the stream under permits issued by your Board, will be detrimental to the public welfare.

This protest is made not only by the parties whose names are signed hereto but also in behalf of the water users and land owners under the Project, who have valuable vested rights by reason of the appropriations heretofore made of the storm and flood waters of the Rio Grande. They are the ones whose lands are charged with the burden and obligation to repay to the Federal Government the costs of construction, operation and maintenance of the Project. They are the ones who, relying on their vested rights, have invested millions of dollars in converting arid lands into thousands of rich and highly productive acres which contribute substantially to the economic life and welfare of the State of Texas and the City of El paso. These rights and these values are not to be impaired or destroyed without clear warrant in law and without adequate compensation.

It is therefore respectfully submitted that the application of the City of El Paso should be denied or suspended pending agreement between the said City and the United States relative to the use of Project works, and reconciling City and project water users'

interests in the storm and flood waters of the Rio Grande in Texas.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
(S.) P. F. BRINKMANN,
(P. F. Brinkman),
President.

Attest:
(S.) L. D. McCOMAS,
(L. D. McComas),
Secretary.

UNITED STATES OF AMERICA,
By L. R. FIOCK,
(L. R. Fiock),
Project Manager, Rio Grande Project.

Jones, Hardie, Grambling, & Howell
Attorneys and Counselors at Law
Seventh Floor Bassett Tower

El Paso, Texas

December 10, 1948

Board of Water Engineers
302 W. 15th Street
Austin, Texas

Gentlemen:

Notice has been received by the undersigned owners of lands located within the Hudspeth County Conser-

vation and Reclamation District of the hearing to be held before the State Board of Water Engineers on an application by the City of El Paso, Texas, for a permit to appropriate of the unappropriated waters of the State of Texas from the Rio Grande River in El Paso County, Texas, not to exceed 27,000 acre-feet of water per annum for domestic and industrial purposes.

In accordance with the provisions of Article 7510 of the Revised Civil Statutes of the State of Texas, protest is hereby made by the undersigned owners of lands located within the Hudspeth County Conservation and Reclamation District to the issuance of such permit to the City of El Paso. This letter is to constitute an appearance in writing in said hearing for the purposes of presenting objection, on behalf of the undersigned owners by their attorney in fact, to the issuance of said permit.

The undersigned owners hereby appoint Richard H. Feuille to act as their attorney, and to represent them in the hearing on the application for a permit by the City of El Paso. We understand that the Hudspeth County Conservation and Reclamation District has likewise submitted a protest to the granting of the permit to the City of El Paso. Since our interests are identical with those of the Hudspeth district with respect to the City of El Paso's application, in so far as its position recognizes the rights of Hudspeth district and seeks to protect them, its position represents our position also. We, therefore, wish to advise the Board of Water Engineers that we adopt and concur in the views of the Hudspeth district in relation to the application of the City of El Paso, and we respectfully request the Board of Water Engineers

that in whatever action may be taken by the Board, provisions be inserted recognizing and protecting the prior and paramount rights of the Hudspeth District and of the undersigned owners.

Very truly yours,

(Signatures of owners and number of acres owner by each, photostated on following page due to illegible signatures.)

" P - 31 " (Cont'd)

Board of Water Engineers

Budget District [illegible]

Owner	[illegible]
[illegible]	2600
Vanderford & [illegible]	487
H.V. Cooke	26[illegible]
T. [illegible]	[illegible]
Harry [illegible]	148
Earl [illegible]	101
[illegible]	[illegible]
H.V. Cooke	26[illegible]
T. [illegible]	[illegible]
Harry [illegible]	148
Earl [illegible]	101
[illegible]	[illegible]
Wilbur Farm	4[illegible]
N.H. Mills	700
Claude Rigby	10[illegible]
B.E. [illegible]	1100
Robert Hillin	63.
Clarence Williams	620
A. G. Brown	133
Bid. Talley	82

Jones, Hardie, Grambling & Howell
Attorneys and Counselors at Law
Seventh Floor Bassett Tower

El Paso, Texas

December 11, 1948

Board of Water Engineers
302 West Fifteenth Street
Austin, Texas

Gentlemen:

Notice has been received of the hearing to be held before the State Board of Water Engineers on an application by th City of El Paso, Texas, for a permit to appropriate of the unappropriated waters of the State of Texas from the Rio Grande River in El Paso County, Texas, not to exceed 27,000 acre-feet of water per annum for domestic and industrial purposes.

In accordance with the provisions of Article 7510 of the Revised Civil Statutes of the State of Texas, protest is hereby made to the issuance of such permit to the City of El Paso. This letter is to constitute an appearance in writing in said hearing for the purposes of presenting objection, on behalf of the Fort Quitman Land Company by their attorney in fact, to the issuance of said permit.

The Fort Quitman Land Company is engaged in farming land which abuts on and is adjacent on the South if the Hudspeth County Conservation and Reclamation District. The former owners and predecessors in title of said land from which the present

owners acquired their title, had been diverting water from the Rio Grande River for farming purposes each year since 1913, and irrigation systems on said land owned by the Fort Quitman Land Company have been operated by the Fort Quitman Land Company and their predecessors in title by water diverted from the Rio Grande River each year since 1913, and such water is now, and has always been used and applied to beneficial use.

The Fort Quitman Land Company and its predecessors in title have always owned riparian water rights, which riparian water rights were acquired by the predecessors in title of the Fort Quitman Land Company before legislative enactments on appropriation of water. In addition to owning riparian water rights, the Fort Quitman Land Company filed its application, No. 814, for a permit to appropriate unappropriated waters of the State of Texas from the Rio Grande River on January 28, 1924. The Fort Quitman Land Company was issued a permit, numbered 776, which granted the right to appropriate above 800 acre-feet of water per annum for 400 acres, which was restricted to two (2) acre-feet of water per each acre actually irrigated. The Fort Quitman Land Company has never forfeited its rights as an appropriator, and said permit is still in effect.

Today the Fort Quitman Land Company has some 1050 acres in cultivation. The waters used by the Fort Quitman Land Company consist of waters flowing into the Rio Grande above the lands owned by Fort Quitman Land Company, some being waters originating above Elephant Butte Dam, and some flowing into the river below said dam, and some of said waters, after being used to irrigate lands above the

lands of this Company are returned to the river through drainage ditches, and some are waters released by the Hudspeth County Conservation and Reclamation District into the Rio Grande River, and the amount of water which is available for use by the Fort Quitman Land Company depends to some extent upon the amount of water released by Hudspeth County Conservation and Reclamation District, which, of course, in turn depends on the amount of water which is made available to the Hudspeth County Conservation and Reclamation District by the El Paso District.

It is the understanding of the Fort Quitman Land Company that the Hudspeth County Conservation and Reclamation District No. 1, as well as the El Paso District, are likewise protesting the issuance of a permit to the City of El Paso, to the extent that the application of the City of El Paso conflicts or interferes with the rights of the Hudspeth District and of the El Paso District; to that same extent the application of the City of El Paso must necessarily conflict with the interests of the Fort Quitman Land Company; and the Fort Quitman Land Company must also, and does hereby, contest the application of the City of El Paso for such permit based upon all of the prior rights of this Company and its predecessors in interest.

It is our understanding that the City of El Paso intends to utilize only such water as would not otherwise be used by lands within the Rio Grande project in El Paso County and by lands within the Hudspeth District. It is our understanding that the City's intention is to use the return flows of the Rio Grande project during the winter season at such times as they are not needed on lands located within the Rio

Grande project and within the Hudspeth District, and to use certain storm flows occurring irregularly in the river at such times, in such amounts, as they are not used or usable upon such lands located within the Rio Grande project in El Paso County, and by lands located within the Hudspeth District.

If the City of El Paso's application is limited in that manner, with the additional limitation that the City of El Paso may use the above described waters at such times and in such amounts as they are not also used or usable upon lands owned by the Fort Quitman Land Company, and if any permit which may be granted to the City of El Paso under its application contains provisions safeguarding the prior right of the Fort Quitman Land Company, as well as of the Hudspeth District and of the El Paso District, then we would have no objection to the City's use of such surplus waters, if there are any surplus waters. Of course, if there are no surplus waters, and it is not believed that there are any surplus waters, then the Board should reject the application of the City of El Paso in accordance with the provisions of Article 7503 of the Revised Civil Statutes of the State of Texas, which provide that:

"If it appear that there is no unappropriated waters in the source of supply, the Board may thereupon reject such application."

It is our belief that all of the waters of the Rio Grande River have been appropriated by prior appropriators, that there are no unappropriated or surplus waters, and that consequently, the Board should not grant this permit to the City of El Paso because

if the Board does do so it will be appropriating waters which have already been appropriated by prior users.

We, therefore, submit this protest against the application of the City of El Paso for a permit, but should the Board of Water Engineers grant such permit, we respectfully request of the Board that in whatever permit may be granted by the Board, provisions be inserted recognizing and protecting the prior and paramount rights of the Fort Quitman Land Company and of the Hudspeth District.

Yours very truly,
FORT QUITMAN LAND COMPANY,
By (S.) V. P. SIGMUND ROPER;
JONES, HARDIE, GRAMBLING and HOWELL,
By (S.) R. H. FEUILLE.

Before the Board of Water Engineers, State of Texas.

Re: Application of the City of El Paso, El Paso, Texas, No. 1584.

Come now The City of El Paso, El Paso County, Texas, Applicant and El Paso County Water Improvement District No. One, acting herein by and through Louis A. Scott, Esquire, of El Paso, Texas, its Attorney of record;

United States of America and the Department of Interior of the United States of America, Rio Grande Project, acting herein by and through Spencer L. Baird, Esquire, Regional Counsel of the Bureau of

Reclamation, Attorney of record; Hudspeth County Conservation and Reclamation District No. One, acting herein by and through Richard H. Feuille, Esquire, Attorney of record; Fort Quitman Land Company, Sam H. Cook, T. D. Sheppard, Kenzie H. Turner, Earl Beasley, W. E. Upchurch, S. S. Upchurch, Ronald Miller, A. B. Cathey, T. D. Lovelady, Paul O. Davidson, Roy H. Davidson, R. C. Ivey, and R. T. Hoover, Jr., Joseph R. Hoover and Louann Hoover Feuille, owners of Hoover-hoover-hoover Farms, acting herein by and through Richard H. Feuille, Esquire, Attorney of record, and

Other land owners, of Hudspeth County, Protestants herein, who have appeared by and through Richard H. Feuille, Esquire, their Attorney of record, Protestants, and file therein, as part of the record in this proceeding, their agreed Stipulation and Agreement, to the following effect:

I.

In this proceeding, the City of El Paso, as Applicant, seeks a Permit to appropriate from the unappropriated waters of the State of Texas, from the Rio Grande, in El Paso County, Texas, not to exceed 27,000 acre feet per annum for domestic and industrial purposes, by impounding not to exceed 16,000 acre feet in a reservoir having a capacity of 3,000 acre feet and to divert in addition to said 16,000 acre feet to be so impounded, 11,000 acre feet by direct diversion of return flow waters without the use of storage, all as specifically set out and described in the Application of the City of El Paso and the Plans and Drawings in support thereof heretofore filed by

the said City of El Paso and now pending under Docket No. 1584.

II.

The Application of the City of El Paso came on for hearing before this Honorable Board on December 13th and 14th, 1948. Under date of the 14th day of December, 1948, this Honorable Board entered herein its Order and Finding to the effect that additional time for presentation of further data and information having been requested by Protestants appearing in opposition to said Application of the said City of El Paso, including the Protestants now filing this Stipulation, and by agreement of the Applicant, the Board took said Application under advisement and continued the hearing thereon from day to day, all as will more fully appear by Order of this Honorable Board entered on the aforesaid 14th day of December, 1948, and of record in these proceedings.

III.

Thereafter, and from time to time this Honorable Board postponed further hearing in said matter upon application of El Paso County Water Improvement District No. One, United States of America, Hudspeth County Conservation and Reclamation District No. One, Fort Quitman Land Company, Robert T. Hoover, Jr., Joseph R. Hoover, Louann Hoover Feuille, R. C. Ivey, and forty-four other land owners in the Hudspeth District, said application for said postponement of hearing reciting, in part, that the parties most directly involved and concerned had expressed a willingness to attempt to reach an agreement that would compromise and settle their differences, growing out

of and deriving from the Application of the City as aforesaid, said moving parties seeking further postponement in the interest of affording time and opportunity for the pursuit of such negotiations, such amicable settlement of said controversies being sought, in the interest of relieving the parties involved therein of large prospective expenditures of time, money and effort, and of relieving this Honorable Board of the burden of further involved proceedings herein.

IV

Heretofore, to-wit, on the 10th day of August, 1949, there was executed by and between the City of El Paso and the El Paso County Water Improvement District No. One, a certain contract settling and adjusting the respective claims of said parties involving relative rights and priorities of use of the waters of the Rio Grande sought to be appropriated by the City of El Paso under its pending Application, which said contract was duly approved by the Secretary of the Interior of the United States of America, subject to acceptance by the City of El Paso and the El Paso County Water Improvement District No. One of the conditions enumerated in certain letters addressed by the Secretary of the Interior under date of September 23, 1949, to the City of El Paso and the El Paso County Water Improvement District No. One, respectively. A copy of said contract bearing the approval of the Secretary of the Interior, together with copies of the Resolution adopted by the City Council of the City of El Paso under date of August 9, 1949, authorizing the execution thereof by the Mayor of said City, and copy of a Resolution adopted by the Board of Directors of El Paso County Water Improve-

ment District No. One on August 5, 1949, authorizing the execution of said contract on behalf of said Water District, is hereto attached, marked for identification Exhibit "A", and by reference made a part hereof. Attached hereto is found, designated Exhibit "B" and by reference made a part hereof, copy of a letter addressed by the Honorable J. A. Krug, Secretary of the Interior, to Mr. Roland Harwell, General Manager, El Paso County Water Improvement District No. One, of date September 23, 1949, defining the conditions upon which the Secretary of the Interior approved said contract; and, as well, copy of a letter addressed under said date of September 23, 1949, by the Secretary of the Interior to the Honorable D.L.P. Duke, Mayor of the City of El Paso, defining the conditions subject to which the Secretary of the Interior approved said contract, said latter document being designated Exhibit "C". Attached hereto will also be found copy of Resolution adopted by the Board of Directors of El Paso County Water Improvement District No. One, on September 30, 1949, accepting the conditions laid down by the Secretary of the Interior, said instrument being designated Exhibit "D"; and copy of Resolution adopted by the City Council of the City of El Paso under date of September 28, 1949, accepting the conditions laid down by the Secretary of the Interior, said instrument being designated Exhibit "E". Attached hereto will also be found copy of a letter addressed by H. E. Robbins, Regional Director, Bureau of Reclamation, under date of October 5, 1949, to Hon. Dan Duke, Mayor, City of El Paso, placing in effect as of September 23, 1949, the contract aforesaid, said instrument being designated Exhibit "F".

V.

Said contract executed on the aforesaid 10th day of August, 1949, became effective as of the 23rd day of September, 1949, and now stands a valid and binding contract between the said City of El Paso, Applicant herein, and the said El Paso County Water Improvement District No. One, and said contract is now in full force and effect.

VI.

The parties signatory hereto, in view of the amicable settlement and adjustment of the matters in controversy between them herein, and in effectuating the purpose and intent of the agreement effecting an amicable compromise and adjustment of said controversies, do hereby formally and expressly stipulate, for all purposes of this proceeding, as follows:

(a) That the Protestants hereinabove named and parties signatory hereto do hereby severally withdraw their and each of their protest to the granting by the Board of Water Engineers of the State of Texas of the Application of the City of El Paso to appropriate the waters of the Rio Grande River in conformity with and to the extent sought in the Application of the City of El Paso, pending before this Honorable Board, subject, however, to the express condition in Sub-paragraph (c) hereof succeeding.

(b) Said Protestants, and each of them, expressly agree and stipulate that this Honorable Board may grant the Application of the City of El Paso to appropriate waters of the Rio Grande in conformity with its Application aforesaid, in the amount of ex-

cess waters therein sought to be appropriated, or in such amount as this Honorable Board shall find from the record herein available for such appropriation, but not in excess of the amount stipulated in said Application, if this Honorable Board finds said Application in due form and sufficient under the applicable laws of the State of Texas to support the grant of such Permit, but subject to the express condition set out in Paragraph (c) below.

(c) The rights of the City of El Paso under the terms of such Permit as this Honorable Board shall see fit to grant in these proceedings, shall stand expressly conditioned by and made subject to the terms and conditions of that certain Contract between the City of El Paso, Applicant, and El Paso County Water Improvement District No. One, hereinabove referred to, copy of which is attached hereto, marked for identification Exhibit "A", as such contract has been interpreted, and as so interpreted approved by the Secretary of the Interior in his letters referred to in Article IV hereof.

Done this 1st day of December, A. D. 1949.

CITY OF EL PASO.
Applicant.
By (S.) D. L. P. DUKE.
Mayor.
JOE G. BENNIS.
Its Attorney of Record.
EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. ONE.
By (S.) P. F. BRINKMANN.
President.

(S.) LOUIS A. SCOTT,
Counsel of Record.
UNITED STATES OF AMERICA and the DEPARTMENT OF THE INTERIOR OF THE UNITED STATES OF AMERICA, RIO GRANDE PROJECT,
By (S.) SPENCER L. BAIRD,
Regional Counsel of Bureau of Reclamation, Attorney of Record.
HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. ONE.
By (S.) RICHARD H. FEUILLE,
Attorney of Record.
FORT QUITMAN LAND COMPANY, SAM H. COOK, T. D. SHEPPARD, KENZIE H. TURNER, EARL BEASLEY, W. E. UPCHURCH, S. S. UPCHURCH, RONALD MILLER, A. B. CATHEY, T. D. LOVELADY, PAUL O. DAVIDSON, ROY H. DAVIDSON, R. C IVEY, AND R. T. HOOVER, JR., JOSEPH R. HOOVER AND LOUANN HOOVER FEUILLE, owners of HOOVER-HOOVER-HOOVER FARMS.
By (S.) RICHARD H. FEUILLE,
Atty.

OTHER LAND OWNERS OF HUDSPETH COUNTY, PROTESTANTS HEREIN,
By (S.) RICHARD H. FEUILLE,
Attorney of Record.

Contract Between the City of El Paso and El Paso County Water Improvement District Number One

This Agreement, made this 10th day of August, 1949 between the City of El Paso, a Texas municipality, referred to herein as the City, and El Paso County Water Improvement District Number One, a municipal corporation of Texas, referred to herein as the District,

Witnesseth:

Whereas, growth in the City's population and drafts made by the City and others upon the ground water table, the City's principal source of domestic water supply, have made it necessary for the City to procure a surface water supply to supplement its pumping supply; and,

Whereas, there has been appropriated under the laws of New Mexico and Texas for and on behalf of the Rio Grande Federal Irrigation Project in New Mexico and Texas, comprising lands of the District and the Elephant Butte Irrigation District a New Mexico muncipiality, and appropriations have also been made for Hudspeth County Conservation and Reclamation District Number One, herein referred to as the Hudspeth District, and the District claims all such appropriations cover all of the appropriable

waters of the Rio Grande River for the Irrigation lf lands in said districts; and,

Whereas, in normal operation of the Rio Grande Project there are intermittent flows of water in the Rio Grande River in the vicinity of the City in excess of the requirements of the District and the Hudspeth District, resulting from Project developed drainage and return flow during periods of non-irrigation use, storm runoff, and unavoidable Project operating wastes due to sudden climatic changes occurring intermittently throughout the year, and other exigencies involved in the release and distribution of water for use upon said Project lands; and

Whereas, the City has urged a claim in equity against the Rio Grande Project for sewage effluent placed in the Rio Grande River from the City's operation of its sewage and water systems, a considerable amount of which effluent becomes commingled with the waters of the Rio Grande River and is available for use and is used by lands of the District for irrigation purposes; and,

Whereas, it is the desire of the District and the City to cooperate to the end of avoiding controversy and litigation between themselves and to settle and compromise their respective claims involving relative rights and priorities of use of the waters hereinabove referred to for domestic and irrigation purposes.

Now Therefore, it is agreed

1. The District, subject to approval hereof by the Secretary of the Interior of the United States, will permit use by the City of Rio Grande Project works serving the District lands, for the purpose of this

agreement, to the extent, in the manner, and at such points, as will not interfere with the operation and use of such works for the benefit of the District and its lands, all as determined by the Project Manager of the Rio Grande Project, hereinafter referred to as the Project Manager.

2. At such times and to the extent there may be storm, return flow, and unavoidable operating waste waters in the Rio Grande or in the Project works serving the District, at points available for diversion by the City and in excess of the requirements of the District and the Hudspeth District, the City may divert and use all or any part of such waters for domestic and municipal purposes by the City: By "requirements of the District and the Hudspeth District" is meant the amount of water determined by the Project Manager to be necessary to supply lands within the said two districts for irrigation, domestic, and related purposes. The City may, at its option, construct and operate at its cost facilities for impounding or storing any waters to which it may become entitled under this contract. If so impounded or stored, such waters shall thereupon become the property of the City to be used by it at any time thereafter for domestic and municipal purposes.

3. The determination of availability of such waters as to time, points of availability, and quantity, and the requirements of said two districts from time to time, shall be made by said Project Manager, whose decision shall be final; and the diversion and use of such waters by the City shall be confined to and in conformity with such determination.

4. As a means of facilitating the determination of the availability of such excess waters, the Project Manager may employ on full time an engineer, and such additional persons as may be mutually agreed upon by the parties hereto, to make all necessary surveys and estimates and compile data and other information necessary for a determination by the Project Manager of the availability of such waters to the City, all under the immediate supervision and direction of said Project Manager, and copies of all such data so obtained shall upon request be made available to the City.

5. The City shall cause accurate records to be kept of the diversion and use of waters covered by this agreement, and shall upon request supply the Project Manager of the District with complete and correct copies of such records.

6. It is understood that rights to the use of waters by the City under the terms of this agreement are not guaranteed by the District, and that the City assumes full responsibility for the protection of its rights to use such waters against any and all adverse claims, and the City will hold the District and its officers harmless from any and all claims arising out of the City's use of water under the terms hereof, and from any and all claims for damages resulting from inaccurate distribution of the waters covered by this agreement, failure or inadequacy of Project Works, and any other circumstance or condition over which the District has no control.

7. For use of the Project works serving the District the City will pay to the District, on rendition of bills therefor, annually on November 1 of the current

calendar year and each and every year hereafter, charges at rates and in amounts as follows:

(1) For each and every acre-foot of water diverted and used by the City for the diversion and use of which Project works are used, the City will pay at the same rate of charge per acre-foot then prevalent for excess water as made by the District against its lands. "Excess water", as used in this paragraph, means those waters delivered to district lands, in addition to that which may be delivered to said lands by the District upon the payment of the District's minimum charge.

(2) In addition to the charges as set forth in the preceding paragraph (1), the City will pay to the District all costs incurred under Article 4 of this agreement.

8. Interest shall accrue at 6% per annum from maturity of charges payable by the City under the terms of this agreement, and the City agrees to pay such interest charges.

9. The City shall provide, maintain and operate at its own cost all works and facilities required to divert water from Project works, or from the Rio Grande River, to the City's treating plant or other places where water is to be received by the City.

10. The City is now discharging and may in the future discharge into the Rio Grande sewage effluent resulting from the use of water for municipal, industrial and domestic purposes obtained from sources other than the project water supply. It is expressly

understood that in executing this contract, or in accepting the benefits thereof, the City shall not be held to have in anywise relinquished, modified or impaired its title to, ownership of, and its right to control and determine the use and disposition of such effluent prior to its discharge into the Rio Grande. It is further understood that after such effluent is discharged into the Rio Grande it constitutes part of the Project water supply.

11. This agreement shall be subject to the terms and conditions of all contracts now or hereafter in effect between the District and the United States of America, and between the Hudspeth County Conservation and Reclamation District No. 1 and the United States, and shall also be subject to all the applicable Reclamation Laws of the United States of America and any Acts that may be adopted as amendments or supplements thereto.

12. The City shall be free to prosecute to a conclusion, or dismiss, as the governing body of the City shall, in its judgment and discretion determine, the City's Application now pending before the State Board of Water Engineers, Numbered 1584 on the docket of said Board, whereunder the City seeks to appropriate waters of the Rio Grande in the amount and subject to the conditions in said petition defined. If the City shall elect to prosecute said Application to a conclusion, any award or permit granted thereunder by the State Board of Water Engineers shall, by stipulation of the parties hereto filed in said proceeding be made subject to the terms and conditions of this undertaking.

In Witness Whereof, the parties hereto have signed their names on the date first above written.

CITY OF EL PASO,
By (Sgd.) D. L. P. DUKE,
Mayor.

(Seal)

Attest:
(Sgd.) W. R. COLLINS,
City Clerk.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NUMBER ONE,
By (Sgd.) P. F. BRINKMANN,
President.

(Seal)

Attest:
(Sgd.) L. D. McCOMAS,
Secretary.

Approved: Subject to the acceptance by the City of El Paso and the El Paso County Water Improvement District No. 1 of the conditions enumerated in my letters, dated September 23, 1949, to those parties. Sept. 23, 1949.

(Sgd.) J. A. KRUG,
Secretary of the Interior.

Resolution

Be it Resolved by the City Council of the City of El Paso:

That the Mayor be authorized to sign on behalf of the City, and the City Clerk to attest, a contract

with El Paso County Water Improvement District Number One for the use by the City of storm, return flow and operating waste waters.

Adopted this 9th day of August, 1949.

(S.) D. L. P. DUKE,
Mayor.

Attest:
(S.) W. R. COLLINS,
City Clerk.

I hereby certify that the above is a true copy of a resolution of the City Council of the City of El Paso as the same appears in its minutes.

(S.) W. R. COLLINS,
City Clerk.

Excerpts From Minutes of a Meeting of the Board of Directors of El Paso County Water Improvement District Number One Held on August 5, 1949.

"Consideration was given to the proposed contract between the City of El Paso and El Paso County Water Improvement District Number One providing for a supplemental municipal water supply from project sources. Following discussion in detail concerning the various provisions of the said contract, on motion of Mr. Briggs, seconded by Mr. McComas and unanimously carried, the following resolution was adopted.

Resolved, that the President and the Secretary of this District be, and they are hereby authorized and directed to execute for and on behalf of the District the form of contract considered at his meeting between the City of El Paso, Texas and El Paso County

Water Improvement District Number One when said contract has been authorized by the City Council of the City of El Paso, Texas, and executed by the Mayor and City Clerk of said City following such authorization."

I, L. D. McComas, Secretary of El Paso County Water Improvement District Number One, certify the above to be a true and correct copy of an excerpt from the minutes of a special meeting of the Board of Directors of El Paso County Water Improvement District Number One held at the office of the District in the City of El Paso, Texas on August 5, 1949, at which a quorum was present throughout, and that said resolution has not been revoked or modified.

To certify which I hereunto subscribe my hand and affix the seal of said District at El Paso, Texas on this 10th day of August, 1949.

(S.) L. D. McCOMAS,
(L. D. McComas),
Secretary El Paso County
Water Improvement Dis-
trict Number One.

(Seal)

United States
Department of the Interior
Office of the Secretary
Washington 25, D. C.

September 23, 1949

Air Mail

My dear Mr. Harwell:

I have approved the enclosed agreement entitled "Contract between the City of El Paso and El Paso

County Water Improvement District Number One", heretofore executed by the City and your district on August 10. However, my approval of that document and its effective date is conditioned on the receipt of appropriate written evidence of acceptance by your district and the City of El Paso of the interpretations and clarifications of the terms and provisions therein contained as follows:

(a) In article 6 the word "District" wherever used shall also be interpreted to include "the United States and its officers" in all respects the same as if that language appeared therein.

(b) Article 11 shall be interpreted to read in all respects the same as if the language "between the Elephant Butte Irrigation District and the United States of America" had been inserted after the words "United States of America", in line 3 thereof.

(c) Nothing contained in Article 12 or any other provision of the contract shall be understood to prevent, foreclose or in any manner restrict the right of the United States in any action or proceeding whatsoever to oppose any application by whomever to appropriate or utilize the waters of the Rio Grande. Neither this contract nor any actions taken pursuant to its provisions shall be understood or recognized to be in derogation of the rights of the United States to use the waters of the Rio Grande pursuant to withdrawals, filings, and appropriations made under the laws of New Mexico and Texas for the benefit of the project.

(d) Nothing contained in the contract is intended to limit in any manner whatsoever either the character or scope of future project development and the right of the United States to utilize all of the available waters of the Rio Grande including flood and return flow for the benefit of the project.

Appropriate evidence of acceptance by your district should be sent to Mr. H. E. Robbins, Regional Director, Bureau of Reclamation, Amarillo, Texas. On receipt of such evidence of acceptance from your district and the City, Mr. Robbins is authorized to advise you promptly of the effective date of the contract.

As will be evident to your district and to the City of El Paso, to whom I am addressing a letter of like import, the above interpretations and clarifications are for the purpose of avoiding future misunderstandings and possible contentions which in the interest of the project and its full development need be clearly recognized. So far as I am aware the expressions of intent are understanding set forth in the preceding paragraph are compatible in all respects with the remarks and views indicated by you and Mayor Duke in our conference of August 16.

My letter to the Mayor raises one note of warning with respect to the possibility of the City undertaking the construction of a storage facility and otherwise expanding its municipal water system. It is my view that sizeable expenditures by the City to these ends should not be made in reliance on the prospect that appreciable quantities of water in excess of project requirements will be available in the Rio Grande. I

emphasize, as I did in our conference discussion, that the arrangements embraced in the enclosure may not be expected to provide a satisfactory or permanent solution of the City's municipal water problems.

Sincerely yours,
(Sgd.) J. A. KRUG,
Secretary of the Interior.

Mr. Roland Harwell, General Manager
El Paso County Water Improvement
District Number One
306 El Paso National Building
El Paso, Texas

Enclosure

United States
Department of the Interior
Office of the Secretary
Washington 25, D. C.

September 23, 1949

Air Mail

My dear Mayor Duke:

I have approved the enclosed agreement entitled "Contract between the City of El Paso and El Paso County Water Improvement District Number One", heretofore executed by the City and the District on August 10, 1949. However, my approval of that document and its effective date is conditioned on the receipt of appropriate written evidence of acceptance by the City and the El Paso district of the interpreta-

tions and clarifications of the terms and provisions therein contained as follows:

(a) In article 6 the word "District" wherever used shall also be interpreted to include "the United States and its officers" in all respects the same as if that language appeared therein.

(b) Article 11 shall be interpreted to read in all respects the same as if the language "between the Elephant Butte Irrigation District and the United States of America" had been inserted after the words "United States of America", in line 3 thereof.

(c) Nothing contained in article 12 or any other provision of the contract shall be understood to prevent, foreclose or in any manner restrict the right of the United States in any action or proceeding whatsoever to oppose any application by whomever to appropriate or utilize the waters of the Rio Grande. Neither this contract nor any actions taken pursuant to its provisions shall be understood or recognized to be in derogation of the rights of the United States to use the waters of the Rio Grande pursuant to withdrawals, filings, and appropriations made under the laws of New Mexico and Texas for the benefit of the project.

(d) Nothing contained in the contract is intended to limit in any manner whatsoever either the character or scope of future project development and the right of the United States to utilize all of the available waters of the Rio Grande including flood and return flow for the benefit of the project.

Appropriate evidence of acceptance by the City should be sent to Mr. H. E. Robbins, Regional Director, Bureau of Reclamation, Amarillo, Texas. On receipt of such evidence of acceptance from the City and the District, Mr. Robbins is authorized to advise you promptly of the effective date of the contract.

As will be evident to the City and to the El Paso County Water Improvement District Number One, to whom I am addressing a letter of like import, the above interpretations and clarifications are for the purpose of avoiding future misunderstandings and possible contentions which in the interest of the project and its full development need be clearly recognized. So far as I am aware the expressions of intent and understanding set forth in the preceding paragraph are compatible in all respects with the remarks and views indicated by you and Mr. Harwell in our conference of August 16.

With respect to the possibility of the City undertaking the construction of the storage facility and otherwise expanding its municipal water system, I should like to indicate a brief note of warning. It is my view that sizeable expenditures by the City to these ends should not be made in reliance on the prospect that appreciable quantities of water in excess of project requirements will be available in the Rio Grande. I emphasize, as I did in our conference discussion, that the arrangements embraced in the enclosure may not be expected to provide a satisfactory or permanent solution of the City's municipal water problems.

Sincerely yours,
(S.) J. A. KRUG,
Secretary of the Interior.

Excerpt from Minutes of a Meeting of the Board of Directors of El Paso County Water Improvement District No. 1 held on the 30th day of September, 1949.

On motion made by Mr. Warnock, seconded by Mr. Briggs, the following resolution was unanimously adopted:

Whereas, by written contract dated August 10, 1949, the City of El Paso, a Texas municipality, and El Paso County Water Improvement District No. 1, a municipal corporation of Texas, entered into an agreement whereby the City may obtain a supplemental water supply for domestic and municipal purposes, reference being hereby made to said contract for all its terms and provisions the same as if contained herein, and.

Whereas, said contract requires that it shall be approved by the Secretary of the Interior of the United States before the same becomes effective, and.

Whereas, the Secretary of the Interior by letters dated September 23, 1949 has notified the parties to said contract that he has approved same subject to the condition that each of the parties furnish appropriate written evidence of acceptance of the following interpretations and clarifications of the terms and provisions contained in said contract:

(a) That in Article 6 wherever the word "District" is used such word shall also be interpreted to include "The United States and its Officers" in all respects the same as if that language appeared therein.

(b) That Article 11 shall be interpreted to read in all respects the same as if the language "between the Elephant Butte Irrigation District and the United States of America" had been inserted after the words "United States of America", in line 3 thereof.

(c) That nothing contained in Article 12 or any other provision of the contract shall be understood to prevent, foreclose or in any manner restrict the right of the United States in any action or proceeding whatsoever to oppose any application by whomever to appropriate or utilize the waters of the Rio Grande. Neither this contract nor any actions taken pursuant to its provisions shall be understood or recognized to be in derogation of the rights of the United States to use the waters of the Rio Grande pursuant to withdrawals, filings, and appropriations made under the laws of New Mexico and Texas for the benefit of the project.

(d) That nothing contained in the contract is intended to limit in any manner whatsoever either the character or scope of future project development and the right of the United States to utilize all of the available waters of the Rio Grande including flood and return flow for the benefit of the project.

Now Therefore, Be It Resolved by the Board of Directors of El Paso County Water Improvement District No. 1 that each and all of the above set out interpretations and clarifications of said contract be, and the same are hereby, adopted, ratified, and approved by El Paso County Water Improvement District No. 1, and that each and all of said terms and

provisions shall be considered a part of said contract the same as if written therein.

Be It Further Resolved, that the President and Secretary of this District furnish a certified copy of this resolution to Mr. H. E. Robbins, Regional Director, Bureau of Reclamation, Amarillo, Texas, as directed by the Secretary of the Interior in his letter of September 23, 1949, and that said officers furnish another certified copy of this resolution to the City of El Paso.

Resolution.

Whereas, The City of El Paso and the El Paso County Water Improvement District Number One entered into a written contract dated August 10, 1949, whereby the City may obtain a supplemental water supply for domestic and municipal purposes, said contract being subject to the approval of the Secretary of the Interior of the United States; and whereas the Secretary of the Interior has approved said contract subject to acceptance by the City and the Water Improvement District of certain interpretations and clarifications set forth in a letter dated September 23, 1949, from the Secretary of the Interior to the Mayor of El Paso;

Now, Therefore, Be It Resolved by the City Council of the City of El Paso:

That the following interpretations and clarifications of the aforesaid contract, being the same as set forth in the said letter of September 23, 1949, from the Secretary of the Interior, be and are hereby adopted,

ratified and approved by the City of El Paso, and shall be considered to be a part of said contract as if written therein:

(a) In article 6 the word "District" wherever used shall also be interpreted to include "The United States and its officers" in all respects the same as if that language appeared therein.

(b) Article 11 shall be interpreted to read in all respects the same as if the language, "between the Elephant Butte Irrigation District and the United States of America" had been inserted after the words "United States of America", in line 3 thereof.

(c) Nothing contained in article 12 or any other provisions of the contract shall be understood to prevent, foreclose or in any manner restrict the right of the United States in any action or proceeding whatsoever to oppose any application by whomever to appropriate or utilize the waters of the Rio Grande. Neither this contract nor any action taken pursuant to its provisions shall be understood or recognized to be in derogation of the rights of the United States to use the waters of the Rio Grande pursuant to withdrawals, filings, and appropriations made under the laws of New Mexico and Texas for the benefit of the project.

(d) Nothing contained in the contract is intended to limit in any manner whatsoever either the character or scope of future project development and the right of the United States to utilize all of the available waters of the Rio Grande including flood and return flow for the benefit of the project.

And be it further resolved that a certified copy of this resolution be furnished to Mr. H. E. Robbins, Regional Director, Bureau of Reclamation, Amarillo, Texas, and to said Water Improvement Disrtict.

Adopted this 28th day of September, 1949.

(S.) D. L. P. DUKE,
Mayor.

Attest:
(S.) W. R. COLLINS,
City Clerk.

United States
Department of the Interior
Bureau of Reclamation

Region V

Post Office Box 1609
Amarillo, Texas

October 5, 1949

Hon. Dan Duke, Mayor,
City of El Paso,
El Paso, Texas.

My dear Mayor Duke:

Receipt is acknowledged of your letter dated October 3, 1949, enclosing a certified copy of the resolution of the City Council accepting the interpretations and clarifications by the Secretary of the Interior of the terms and provisions of contract between the City of El Paso and El Paso County Water Improvement District No. 1, heretofore executed by the City and the District on August 10, 1949, as required in a letter from the Secretary to you dated September 23,

1949. The resolution appears to be in conformity with the Secretary's letter and in accordance therewith, I have the pleasure of informing you that the said contract has the approval of the Secretary effective September 23, 1949.

Yours very truly,
(S.) H. E. ROBBINS,
Regional Director.

Permit to Appropriate Public Waters of the State of Texas

No. 1535

Whereas, the City of El Paso, Texas, a municipal corporation of the State of Texas, situated in the County of El Paso, did, on the 1st day of November, A. D. 1948, file with the Board of Water Engineers of the State of Texas, its application No. 1584, for a permit to appropriate from the Rio Grande in El Paso County, Texas, for municipal and domestic use, 27,000 acre-feet of water per annum of the unappropriated storm and flood waters of the State of Texas and the unused return flow waters of the Rio Grande Project of the Bureauf of Reclamation of the Department of the Interior, United States of America, 6,000 acre-feet per annum of said 27,000 acre-feet to be impounded in a storage reservoir, to be constructed in conformity with certain plans and specifications filed with and constituting a part of the application aforesaid, the remainder, or 11,000 acre-feet per annum to be appropriated by direct diversion of return and flood waters without the use of storage and

Whereas, heretofore, to-wit, on the 13th and 14th days of December 1948, after due notice to all parties in interest, the Board of Water Engineers of the State of Texas did, at its office in the City of Austin, Texas, hold a public hearing on said application, and at said hearing there was duly presented by the City of El Paso, applicant, both oral and documentary evidence in support of its said application, and all and singular the protestants filing protests against the granting of said application entered their appearance herein, and the testimony offered by said protestants was heard and considered, all after due notice as prescribed by the laws of the State of Texas, and upon the conclusion of said hearing, upon application of certain of the protestants and with the consent of the applicant, said Board of Water Engineers continued said hearing from day to day and did take the matter under advisement, all as evidenced by Order of said Board entered in these procedings on the aforesaid 14th day of December, 1948; and

Whereas, the Board has fully considered all matters and things presented for the Board's consideration herein, has heard all the evidence affecting said application, and, on the 8th day of May, 1950, did make and cause to be entered an order granting said application of the City of El Paso.

Now, Therefore, The Board of Water Engineers of the State of Texas, does, by these presents, grant this permit unto the said City of El Paso, a municipal corporation, of El Paso County, Texas, to divert, appropriate and use from the source of supply hereinafter named, and by the means hereinafter described, an amount of the public waters of the State of Texas,

not exceeding 27,000 acre-feet per annum, to consist of the unappropriated or unused storm, flood and return waters of the Rio Grande, in El Paso County, Texas, for municipal and domestic uses, or so much thereof as may be necessary, but not in excess of 27,000 acre-feet per year, when beneficially used, for supplying the municipal and domestic needs of the said City of El Paso and its residents; the appropriation and diversion of such waters to be effected in the manner following:

(a) The City of El Paso shall have the right hereunder to impound not to exceed 16,000 acre-feet per annum of said total of 27,000 acre-feet per annum in a storage reservoir, to be constructed by the said City of El Paso to be situated about 13.8 miles upstream from the American Dam, and located on the West side of the Rio Grande, having a capacity of 3,000 acre-feet, said reservoir to be filled by diversions from the Rio Grande during times of flood and other excess flows, the water so stored to be released into the Rio Grande as needed by the City; and

(b) The City of El Paso shall have the right hereunder to appropriate and use not to exceed 11,000 acre-feet per annum of said total of 27,000 acre-feet per annum by direct diversion of return and flood waters, without the use of storage, such waters to be diverted from the Rio Grande at the American Diversion Dam on the Rio Grande above El Paso and conveyed through the American Irrigation Canal and the Franklin Canal to the City's water treating plant, where it will be rediverted from the Canal to the plant, or said water, or any portion thereof, may be diverted directly from the Rio Grande at the water

treating plant, through facilities provided, or to be provided by the said City of El Paso, Texas.

Measurement of the water herein permitted to be appropriated by the said City of El Paso is to be made at point of diversion.

The rights and privileges granted by this permit are subsidiary to the rights of any appropriator of water from the said source who began or completed any storage or irrigation plant and diverted any water prior to July 1, 1913, for any purpose prescribed by law and filed a record of such appropriation with the Board of Water Engineers prior to April 1, 1916, and to the rights of any appropriator of water from the same source who has heretofore been granted a permit by said Board to appropriate water from said source of supply.

This permit is granted with the express proviso that the said City of El Paso, grantee, shall comply with all the rules and regulations of the Board of Water Engineers formulated by it pursuant to the authority given by all applicable provisions of the laws of the State of Texas establishing this Board, and governing the grant of water rights.

It is further ordered that the terms of this permit shall be conditioned on, regulated by and subject to any action taken or order made by the Government of the United States, acting through the International Boundary and Water Commission, relative to the disposition and use of the waters of the Rio Grande, said stream being an international boundary stream.

The City of El Paso, applicant, having filed herein, in support of its application, its plans and specifications for the construction of the reservoir hereinabove referred to, and said plans and specifications being

now formally approved, the City El Paso is authorized to proceed to the construction of said reservoir, for use in the impounding of waters authorized hereunder to be appropriated, and unless otherwise ordered by this Board, construction work on the said reservoir shall begin within one (1) year from date hereof and same be completed within two (2) years from said date. It is expressly provided that within ten (10) days after beginning actual construction of said works, the permitted, or its assigns, shall file a statement with the Board showing that such work was begun within the time limit allowed and the extent of the work done, and shall thereafter file monthly statements showing the progress of such construction work until final completion of said works.

Given under the hand and seal of the Board of Water Engineers for the State of Texas, this the 10th day of May, A. D. 1950.

(Signed) H. A. BECKWITH,
(H. A. Beckwith),
Chairman.

(Signed) A. P. ROLLINS,
(A. P. Rollins),
Member.

(Signed) JAMES S. GULEKE,
(James S. Guleke),
Member.

(Seal)

Attest:
(Signed) A. W. McDONALD,
(A. W. McDonald),
Secretary.

* * * * * * * *

Plaintiff's Exhibit 32, having been admitted in evidence, reads in words and figures as follows:

"P-32".

Contract Between the City of El Paso and El Paso County Water Improvement District Number One.

This Agreement, made this 10th day of August, 1949 between the City of El Paso, a Texas municipality, referred to herein as the City, and El Paso County Water Improvement District Number One, a municipal corporation of Texas, referred to herein as the District,

Witnesseth:

Whereas, growth in the City's population and drafts made by the City and others upon the ground water table, the City's principal source of domestic water supply, have made it necessary for the City to procure a surface water supply to supplement its pumping supply; and

Whereas, there has been appropriated under the laws of New Mexico and Texas for and on behalf of the Rio Grande Federal Irrigation Project in New Mexico and Texas, comprising lands of the District and the Elephant Butte Irrigation District, a New Mexico municipality, and appropriations have also been made for Hudspeth County Conservation and Reclamation District Number One, herein referred to as the Hudspeth District, and the District claims all such appropriations cover all of the appropriable

waters of the Rio Grande River for the irrigation of lands in said districts; and,

Whereas, in normal operation of the Rio Grande Project there are intermittent flows of water in the Rio Grande River in the vicinity of the City in excess of the requirements of the District and the Hudspeth District, resulting from Project developed drainage and return flow during periods of non-irrigation use, storm runoff, and unavoidable Project operating wastes due to sudden climatic changes occurring intermittently throughout the year, and other exigencies involved in the release and distribution of water for use upon said Project lands; and

Whereas, the City has urged a claim in equity against the Rio Grande Project for sewage effluent placed in the Rio Grande River from the City's operation of its sewage and water systems, a considerable amount of which effluent becomes commingled with the waters of the Rio Grande River and is available for use and is used by lands of the District for irrigation purposes; and,

Whereas, it is the desire of the District and the City to cooperate to the end of avoiding controversy and litigation between themselves and to settle and compromise their rspctive claims involving relative rights and priorities of use of the waters hereinabove referred to for domestic and irrigation purposes.

Now Therefore, it is agreed:

1. The District, subject to approval hereof by the Secretary of the Interior of the United States, will

permit use by the City of Rio Grande Project works serving the District lands, for the purpose of this agreement, to the extent, in the manner, and at such points, as will not interfere with the operation and use of such works for the benefit of the District and its lands, all as determined by the Project Manager of the Rio Grande Project, hereinafter referred to as the Project Manager.

2. At such times and to the extent there may be storm, return flow, and unavoidable operating waste waters in the Rio Grande or in the Project works serving the District, at points available for diversion by the City and in excess of the requirements of the District and the Hudspeth District, the City may divert and use all or any part of such waters for domestic and municipal purposes by the City. By "requirements of the District and the Hudspeth District" is meant the amount of water determined by the Project Manager to be necssary to supply lands within the said two districts for irrigation, domestic, and related purposes. The City may, at its option, construct and operate at its cost facilities for impounding or storing any waters to which it may become entitled under this contract. If so impounded or stored, such waters shall thereupon become the property of the City to be used by it at any time thereafter for domestic and municipal purposes.

3. The determination of availability of such waters as to time, points of availability, and quantity, and the requirements of said two districts from time to time, shall be made by said Project Manager, whose decision shall be final; and the diversion and use of such waters by the City shall be confined to and in conformity with such determination.

4. As a means of facilitating the determination of the availability of such excess waters, the Project Manager may employ on full time an engineer, and such additional persons as may be mutually agreed upon by the parties hereto, to make all necessary surveys and estimates and compile data and other information necessary for a determination by the Project Manager of the availability of such waters to the City, all under the immediate supervision and direction of said Project Manager, and copies of all such data so obtained shall upon request be made available to the City.

5. The City shall cause accurate records to be kept of the diversion and use of waters covered by this agreement, and shall upon request supply the Project Manager or the District with complete and correct copies of such records.

6. It is understood that rights to the use of waters by the City under the terms of this agreement are not guaranteed by the District, and that the City assumes full responsibility for the protection of its rights to use such waters against any and all adverse claims, and the City will hold the District and its officers harmless from any and all claims arising out of the City's use of water under the terms hereof, and from any and all claims for damages resulting from inaccurate distribution of the waters covered by this agreement, failure or inadequacy of Project Works, and any other circumstance or condition over which the District has no control.

7. For use of the Project works serving the District the City will pay to the District, on rendition of

bills therefor, annually on November 1 of the current calendar year and each and every year hereafter, charges at rates and in amounts as follows:

(1) For each and every acre-foot of water diverted and used by the City for the diversion and use of which Project works are used, the City will pay at the same rate of charge per acre-foot then prevalent for excess water as made by the District against its lands. "Excess water", as used in this paragraph, means thoe waters delivered to district lands, in addition to that which may be delivered to said lands by the District upon the payment of the District's minimum charge.

(2) In addition to the charges as set forth in the preceding paragraph (1), the City will pay to the District all costs incurred under Article 4 of this agreement.

8. Interest shall accrue at 6% per annum from maturity of charges payable by the City under the terms of this agreement, and the City agrees to pay such interest charges.

9. The City shall provide, maintain and operate at its own cost all works and facilities required to divert water from Project works, or from the Rio Grande River, to the City's treating plant or other places where water is to be received by the City.

10. The City is now discharging and may in the future discharge into the Rio Grande sewage effluent resulting fror. the use of water for municipal, industrial and domestic purposes obtained from sources

other than the project water supply. It is expressly understood that in executing this contract, or in accepting the benefits thereof, the City shall not be held to have in anywise relinquished, modified or impaired its title to, ownership of, and its right to control and determine the use and disposition of such effluent prior to its discharge into the Rio Grande. It is further understood that after such effluent is discharged into the Rio Grande it constitutes part of the Project water supply.

11. This agreement shall be subject to the terms and conditions of all contracts now or hereafter in effect between the District and the United States of America, and between the Hudspeth County Conservation and Reclamation District No. 1 and the United States, and shall also be subject to all the applicable Reclamation Laws of the United States of America and any Acts that may be adopted as amendments or supplements thereto.

12. The City shall be free to prosecute to a conclusion, or dismiss, as the governing body of the City shall, in its judgment and discretion determine, the City's Application now pending before the State Board of Water Engineers, Numbered 1584 on the docket of said Board, whereunder the City seeks to appropriate waters of the Rio Grande in the amount and subject to the conditions in said petition defined. If the City shall elect to prosecute said Application to a conclusion, any award or permit granted thereunder by the State Board of Water Engineers shall, by stipulation of the parties hereto filed in said proceeding be made subject to the terms and conditions of this undertaking.

In Witness Whereof, the parties hereto have signed their names on the date first above written.

CITY OF EL PASO,
By (Sgd.) D. L. P. DUKE,
Mayor.

(Seal)
Attset:
(Sgd.) W. R. COLLINS.
City Clerk.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NUMBER ONE,
By (Sgd.) P. F. BRINKMANN.
President.

(Seal)
Attest:
(Sgd.) L. D. McCOMAS.
Secretary.

Approved: Subject to the acceptance by the City of El Paso and the El Paso County Water Improvement District No. 1 of the conditions enumerated in my letters, dated September 23, 1949, to those parties.
Sep. 23, 1949.
(Sgd.) J. A. KRUG.
Secretary of the Interior.

Resolution.

Be It Resolved by the City Council of the City of El Paso:

That the Mayor be authorized to sign on behalf of the City, and the City Clerk to attest, a contract with El Paso County Water Improvement District

Number One for the use by the City of storm, return flow and operating waste waters.

Adopted this 9th day of August, 1949.

(S.) D. L. P. DUKE,
Mayor.

Attest:
(S.) W. R. COLLINS,
City Clerk.

I hereby certify that the above is a true copy of a resolution of the City Council of the City of El Paso as the same appears in its minutes.

(S.) W. R. COLLINS,
City Clerk.

Excerpt from Minutes of a Meeting of the Board of Directors of El Paso County Water Improvement District Number One held on August 5, 1949.

"Consideration was given to the proposed contract between the City of El Paso and El Paso County Water Improvement District Number One providing for a supplemental municipal water supply from project sources. Following discussion in detail concerning the various provisions of the said contract, on motion of Mr. Briggs, seconded by Mr. McComas and unanimously carried, the following resolution was adopted.

Resolved, that the President and the Secretary of this District be, and they are hereby authorized and directed to execute for and on behalf of the District the form of contract considered at this meeting between the City of El Paso, Texas and El Paso County

Water Improvement District Number One when said contract has been authorized by the City Council of the City of El Paso, Texas, and executed by the Mayor and City Clerk of said City following such authorization."

I, L. D. McComas, Secretary of El Paso County Water Improvement District Number One, certify the above to be a true and correct copy of an excerpt from the minutes of a special meeting of the Board of Directors of El Paso County Water Improvement District Number One held at the office of the District in the City of El Paso, Texas on August 5, 1949, at which a quorum was present throughout, and that said resolution has not been revoked or modified.

To certify which I hereunto subscribe my hand and affix the seal of said District at El Paso, Texas on this 10th day of August, 1949.

(S.) L. D. McCOMAS,
(L. D. McComas),
Secretary El Paso County
Water Improvement Dis-
trict Number One.

(Seal)

United States
Department of the Interior
Office of the Secretary
Washington 25, D. C.

September 23, 1949

Air Mail

My dear Mr. Harwell:

I have approved the enclosed agreement entitled "Contract between the City of El Paso and El Paso

County Water Improvement District Number One", heretofore executed by the City and your District on August 10. However, my approval of that document and its effective date is conditioned on the receipt of appropriate writter evidence of acceptance by your district and the City of El Paso of the interpretations and clarifications of the terms and provisions therein contained as follows:

(a) In article 6 the word "District" wherever used shall also be interpreted to include "the United States and its officers" in all respects the same as if that language appeared therein.

(b) Article 11 shall be interpreted to read in all respects the same as if the language "between the Elephant Butte Irrigation District and the United States of America" had been inserted after the words "United States of America", in line 3 thereof.

(c) Nothing contained in Article 12 or any other provision of the contract shall be understood to prevent, foreclose or in any manner restrict the right of the United States in any action or proceeding whatsoever to oppose any application by whomever to appropriate or utilize the waters of the Rio Grande. Neither this contract nor any actions taken pursuant to its provisions shall be understood or recognized to be in derogation of the rights of the United States to use the waters of the Rio Grande pursuant to withdrawals, filings, and appropriations made under the laws of New Mexico and Texas for the benefit of the project.

(d) Nothing contained in the contract is intended to limit in any manner whatsoever either the char-

acter or scope of future project development and the right of the United States to utilize all of the available waters of the Rio Grande including flood and return flow for the benefit of the project.

Appropriate evidence of acceptance by your district should be sent to Mr. H. E. Robbins, Regional Director, Bureau of Reclamation, Amarillo, Texas. On receipt of such evidence of acceptance from your district and the City, Mr. Robbins is authorized to advise you promptly of the effective date of the contract.

As will be evident to your district and to the City of El Paso, to whom I am addressing a letter of like import, the above interpretations and clarifications are for the pu ose of avoiding future misunderstandings and possible contentions which in the interest of the project and its full development need be clearly recognized. So far as I am aware the expressions of intent and understanding set forth in the preceding paragraph are compatible in all respects with the remarks and views indicated by you and Mayor Duke in our conference of August 16.

My letter to the Mayor raises one note of warning with respect to the possibility of the City undertaking the construction of a storage facility and otherwise expanding its municipal water system. It is my view that sizeable expenditures by the City to these ends should not be made in reliance on the prospect that appreciable quantities of water in excess of project requirements will be available in the Rio Grande. I emphasize, as I did in our conference discussion, that the arrangements embraced in the enclosure may not

be expected to provide a satisfactory or permanent solution of the City's municipal water problems.

Sincerely yours,
(Sgd.) J. A. KRUG,
Secretary of the Interior.

Mr. Roland Harwell, General Manager
El Paso County Water Improvement
District Number One
306 El Paso National Building
El Paso, Texas
Enclosure

United States
Department of the Interior
Office of the Secretary
Washington 25, D. C.

September 23, 1949

Air Mail

My dear Mayor Duke:

I have approved the enclosed agreement entitled "Contract between the City of El Paso and El Paso County Water Improvement District Number One", heretofore executed by the City and the District on August 10, 1949 However, my approval of that document and its effectiye date is conditioned on the receipt of appropriate written evidence of acceptance by the City and the El Paso district of the interpretations and clarifications of the terms and provisions therein contained as follows:

(a) In article 6 the word "District" wherever used shall also be interpreted to include "the United States and its officers" in all respects the same as if that language appeared therein.

(b) Article 11 shall be interpreted to read in all respects the same is if the language "between the Elephant Butte Irrigation District and the United States of America" had been inserted after the words "United States of America", in line 3 thereof.

(c) Nothing contained in article 12 or any other provision of the contract shall be understood to prevent, foreclose or in any manner restrict the right of the United States in any action or proceeding whatsoever to oppose any application by whomever to appropriate or utilize the waters of the Rio Grande. Neither this contract nor any actions taken pursuant to its provisions shall be understood or recognized to be in derogation of the rights of the United States to use the waters of the Rio Grande pursuant to withdrawals, filings, and appropriations made under the laws of New Mexico and Texas for the benefit of the project.

(d) Nothing contained in the contract is intended to limit in any manner whatsoever either the character or scope of future project development and the right of the United States to utilize all of the available waters of the Rio Grande including flood and return flow for the benefit of the project.

Appropriate evidence of acceptance by the City should be sent to Mr. H. E. Robbins, Regional Director, Bureau of Reclamation, Amarillo, Texas. On

receipt of such evidence of acceptance from the City and the District, Mr. Robbins is authorized to advise you promptly of the effective date of the contract.

As will be evident to the City and to the El Paso County Water Improvement District Number One, to whom I am addressing a letter of like import, the above interpretations and clarifications are for the purpose of avoiding future misunderstandings and possible contentions which in the interest of the project and its full development need be clearly recognized. So far as I am aware the expressions of intent and understanding set forth in the preceding paragraph are compatible in all respects with the remarks and views indicated by you and Mr. Harwell in our conference of August 16.

With respect to the possibility of the City undertaking the construction of the storage facility and otherwise expanding its municipal water system, I should like to indicate a brief note of warning. It is my view that sizable expenditures by the City to these ends should not be made in reliance on the prospect that appreciable quantities of water in excess of project requirements will be available in the Rio Grande. I emphasize, as I did in our conference discussion, that the arrangements embraced in the enclosure may not be expected to provide a satisfactory or permanent solution of the City's municipal water problems.

Sincerely yours,

(S.) J. A. KRUG.

Secretary of the Interior.

Excerpt from Minutes of a Meeting of the Board of Directors of El Paso County Water Improvement District No. 1 held on the 30th day of September, 1949.

On motion made by Mr. Warnock, seconded by Mr. Briggs, the following resolution was unanimously adopted:

Whereas, by written contract dated August 10, 1949, the City of El Paso, a Texas municipality, and El Paso County Water Improvement District No. 1, a municipal corporation of Texas, entered into an agreement whereby the City may obtain a supplemental water supply for domestic and municipal purposes, reference being hereby made to said contract for all its terms and provisions the same as if contained herein, and

Whereas, said contract requires that it shall be approved by the Secretary of the Interior of the United States before the same becomes effective, and

Whereas, the Secretary of the Interior by letters dated September 23, 1949 has notified the parties to said contract that he has approved same subject to the condition that each of the parties furnish appropriate written evidence of acceptance of the following interpretations and clarifications of the terms and provisions contained in said contract:

(a) That in Article 6 wherever the word "District" is used such word shall also be interpreted to include "The United States and its Officers" in all respects the same as if that language appeared therein.

(b) That Article 11 shall be interpreted to read in all respects the same as if the language "between the Elephant Butte Irrigation District and the United States of America" had been inserted after the words "United States of America", in line 3 thereof.

(c) That nothing contained in Article 12 or any other provision of the contract shall be understood to prevent, foreclose or in any manner restrict the right of the United States in any action or proceeding whatsoever to oppose any application by whomever to appropriate or utilize the waters of the Rio Grande. Neither this contract nor any actions taken pursuant to its provisions shall be understood or recognized to be in derogation of the rights of the United States to use the waters of the Rio Grande pursuant to withdrawals, filings, and appropriations made under the laws of New Mexico and Texas for the benefit of the project.

(d) That nothing contained in the contract is intended to limit in any manner whatsoever either the character or scope of future project development and the right of the United States to utilize all of the available waters of the Rio Grande including flood and return flow for the benefit of the project.

Now, Therefore, Be It Resolved by the Board of Directors of El Paso County Water Improvement District No. 1 that each and all of the above set out interpretations and clarifications of said contract be, and the same are hereby, adopted, ratified, and approved by El Paso County Water Improvement District No. 1, and that each and all of said terms and provisions shall be considered a part of said contract the same as if written therein.

Be It Further Resolved, that the President and Secretary of this District furnish a certified copy of this resolution to Mr. H. E. Robbins, Regional Director, Bureau of Reclamation, Amarillo, Texas, as directed by the Secretary of the Interior in his letter of September 23, 1949, and that said officers furnish another certified copy of this resolution to the City of El Paso.

Resolution.

Whereas, the City of El Paso and the El Paso County Water Improvement District Number One entered into a written contract dated August 10, 1949, whereby the City may obtain a supplemental water supply for domestic and municipal purposes, said contract being subject to the approval of the Secretary of the Interior of the United States; and whereas the Secretary of the Interior has approved said contract subject to acceptance by the City and the Water Improgement District of certain interpretations and clarifications set forth in a letter dated September 23, 1949, from the Secretary of the Interior to the Mayor of El Paso;

Now, Therefore, Be It Resolved by the City Council of the City of El Paso:

That the following interpretations and clarifications of the aforesaid contract, being the same as set forth in the said letter of September 23, 1949, from the Secretary of the Interior, be and are hereby adopted, ratified and approved by the City of El Paso, and shall be considered to be a part of said contract as if written therein:

(a) In article 6 the word "District" wherever used shall also be interpreted to include "The United States and its officers" in all respects the same as if that language appeared therein.

(b) Article 11 shall be interpreted to read in all respects the same as if the language "between the Elephant Butte Irrigation District and the United States of America" had been inserted after the words "United States of America", in line 3 thereof.

(c) Nothing contained in article 12 or any other provision of the contract shall be understood to prevent, foreclose or in any manner restrict the right of the United States in any action or proceeding whatsoever to oppose any application by whomever to appropriate or utilize the waters of the Rio Grande. Neither this contract nor any action taken pursuant to its provisions shall be understood or recognized to be in derogation of the rights of the United States to use the waters of the Rio Grande pursuant to withdrawals, filings, and appropriations made under the laws of New Mexico and Texas for the benefit of the project.

(d) Nothing contained in the contract is intended to limit in any manner whatsoever either the character or scope of future project development and the right of the United States to utilize all of the available waters of the Rio Grande including flood and return flow for the benefit of the project.

And be it further resolved that a certified copy of this resolution be furnished to Mr. H. E. Robbins,

Regional Director, Bureau of Reclamation, Amarillo, Texas, and to said Water Improvement District.

Adopted this 28th day of September, 1949.

(S.) D. L. P. DUKE,
Mayor.

Attest:
(S.) W. R. COLLINS,
City Clerk.

United States Department of the Interior
Bureau of Reclamation
Region V
Post Office Box 1609
Amarillo, Texas

October 5, 1949

Hon. Dan Duke, Mayor
City of El Paso
El Paso, Texas

My dear Mayor Duke:

Receipt is acknowledged of your letter dated October 3, 1949, enclosing a certified copy of the resolution of the City Council accepting the interpretations and clarifications by the Secretary of the Interior of the terms and provisions of contract between the City of El Paso and El Paso County Water Improvement District No. 1, heretofore executed by the City and the District on August 10, 1949, as required in a letter from the Secretary to you dated September 23, 1949.

The resolution appears to be in conformtiy with the Secretary's letter and in accordance therewith. I have the pleasure of informing you that the said con-

tract has the approval of the Secretary effective September 23, 1949.

Yours very truly,
(S.) H. E. ROBBINS;
Regional Director.

Plaintiff's Exhibit 33, having been admitted in evidence, reads in words and figures as follows:

"P-33".

Before the Board of Water Engineers State of Texas.

Re: Application of the City of El Paso, El Paso, Texas, No. 1584.

Come now The City of El Paso, El Paso County, Texas, Applicant and El Paso County Water Improvement District No. One, acting herein by and through Louis A. Scott, Esquire, of El Paso, Texas, its Attorney of record;

United States of America and the Department of Interior of the United States of America, Rio Grande Project, acting herein by and through Spencer L. Baird, Esquire, Regional Counsel of the Bureau of Reclamation, Attorney of record;

Hudspeth County Conservation and Reclamation District No. One, acting herein by and through Richard H. Feuille, Equire, Attorney of record;

Fort Quitman Land Company, Sam H. Cook, T. D. Sheppard, Kenzie H. Turner, Earl Beasley, W. E. Upchurch, S. S. Upchurch, Ronald Miller, A. B. Cathey T. D. Lovelady, Paul O. Davidson, Roy H. Davidson,

R. C. Ivey, and R. T. Hoover, Jr., Joseph R. Hoover and Louanna Hoover Feuille, owners of Hoover Hoover-Hoover Farms, acting herein by and through Richard H. Feuille, Esquire, Attorney of record; and

Other land owners, of Hudspeth County, Protestants herein, who have appeared by and through Richard H. Feuille, Esquire, their Attorney of record, Protestants, and file herein, as part of the record in this proceeding, their agreed Stipulation and Agreement, to the following effect:

I.

In this proceeding, the City of El Paso, as Applicant, seeks a Permit to appropriate from the unappropriated waters of the State of Texas, from the Rio Grande, in El Paso County, Texas, not to exceed 27,000 acre feet per annum for domestic and industrial purposes, by impounding not to exceed 16,000 acre feet in a reservoir having a capacity of 3,000 acre feet and to divert in addition to said 16,000 acre feet to be so impounded, 11,000 acre feet by direct diversion of return flow waters without the use of storage, all as specifically set out and described in the Application of the City of El Paso and the Plans and Drawings in support thereof heretofore filed by the said City of El Paso and now pending under Docket No. 1584.

II.

The Application of the City of El Paso came on for hearing before this Honorable Board on December 13th and 14th, 1948. Under date of the 14th day

of December, 1948, this Honorable Board entered herein its Order and Finding to the effect that additional time for presentation of further data and information having been requested by Protestants appearing in opposition to said Application of the said City of El Paso, including the Protestants now filing this Stipulation, and by agreement of the Applicant, the Board took said Application under advisement and continued the hearing thereon from day to day, all as will more fully appear by Order of this Honorable Board entered on the aforesaid 14th day of December, 1948, and of record in these proceedings.

III.

Thereafter, and from time to time this Honorable Board postponed further hearing in said matter upon application of El Paso County Water Improvement District No. One, United States of America, Hudspeth County Conservation and Reclamation District No. One, Fort Quitman Land Company, Robert T. Hoover, Jr., Joseph R. Hoover, Louann Hoover Feuille, R. C. Ivey, and forty-four other land owners in the Hudspeth District, said application for said postponement of hearing reciting, in part, that the parties most directly involved and concerned had expressed a willingness to attempt to reach an agreement that would compromise and settle their differences, growing out of and deriving from the Application of the City as aforesaid, said moving parties seeking further postponement in the interest of affording time and opportunity for the pursuit of such negotiations, such amicable settlement of said controversies being sought, in the interest of relieving the parties involved therein of large prospective expenditures of time,

money and effort, and of relieving this Honorable Board of the burden of further involved proceedings herein.

IV.

Heretofore, to-wit, on the 10th day of August, 1949, there was executed by and between the City of El Paso and the El Paso County Water Improvement District No. One, a certain contract settling and adjusting the respective claims of said parties involving relative rights and priorities of use of the waters of the Rio Grande sought to be appropriated by the City of El Paso under its pending Application, which said contract was duly approved by the Secretary of the Interior of the United States of America, subject to acceptance by the City of El Paso and the El Paso County Water Improvement District No. One of the conditions enumerated in certain letters addressed by the Secretary of the Interior under date of September 23, 1949, to the City of El Paso and the El Paso County Water Improvement District No. One, respectively. A copy of said contract bearing the approval of the Secretary of the Interior, together with copies of the Resolution adopted by the City Council of the City of El Paso under date of August 9, 1949, authorizing the execution thereof by the Mayor of said City, and copy of a Resolution adopted by the Board of Directors of El Paso County Water Improvement District No. One on August 5, 1949, authorizing the execution of said contract on behalf of said Water District, is hereto attached, marked for identification Exhibit "A", and by reference made a part hereof. Attached hereto is found designated Exhibit

"B" and by reference made a part hereof, copy of letter addressed by the Honorable J. A. Krug, Secretary of the Interior, to Mr. Roland Harwell, General Manager, El Paso County Water Improvement District No. One, of date September 23, 1949, defining the conditions upon which the Secretary of the Interior approved said contract; and, as well, copy of a letter addressed under said date of September 23, 1949, by the Secretary of the Interior to the Honorable D. L. P. Duke, Mayor of the City of El Paso defining the conditions subject to which the Secretary of the Interior approved said contract, said latter document being designated Exhibit "C". Attached hereto will also be found copy of Resolution adopted by the Board of Directors of El Paso County Water Improvement District No. One, on September 30, 1949, accepting the conditions laid down by the Secretary of the Interior, said instrument being designated Exhibit "D"; and copy of Resolution adopted by the City Council of the City of El Paso under date of September 28, 1949, accepting the conditions laid down by the Secretary of the Interior, said instrument being designated Exhibit "E". Attached hereto will also be found copy of a letter addressed by H. E. Robbins, Regional Director, Bureau of Reclamation, under date of October 5, 1949, to Hon. Dan Duke, Mayor, City of El Paso, placing in effect as of September 23, 1949, the contract aforesaid, said instrument being designated Exhibit "F".

V.

Said contract executed on the aforesaid 10th day of August, 1949, became effective as of the 23rd day of September, 1949, and now stands a valid and binding

contract between the said City of El Paso, Applicant herein, and the said El Paso County Water Improvement District No. One, and said contract is now in full force and effect.

VI.

The parties signatory hereto, in view of the amicable settlement and adjustment of the matters in controversy between them herein, and in effectuating the purpose and intent of the agreement effecting an amicable compromise and adjustment of said controversies, do hereby formally and expressly stipulate, for all purposes of this proceeding, as follows:

(a) That the Protestants hereinabove named and parties signatory hereto do hereby severally withdraw their and each of their protest to the granting by the Board of Water Engineers of the State of Texas of the Application of the City of El Paso to appropriate the waters of the Rio Grande River in conformity with and to the extent sought in the Application of the City of El Paso, pending before this Honorable Board, subject, however, to the express condition in Sub-paragraph (c) hereof succeeding.

(b) Said Protestants, and each of them, expressly agree and stipulate that this Honorable Board may grant the Application of the City of El Paso to appropriate waters of the Rio Grande in conformity with its Application aforesaid, in the amount of excess waters therein sought to be appropriated, or in such amount as this Honorable Board shall find from the record herein available for such appropriation, but not in excess of the amount stipulated in said

Application, if this Honorable Board finds said Application in due form and sufficient under the applicable laws of the State of Texas to support the grant of such Permit, but subject to the express condition set out in Paragraph (c) below.

(c) The rights of the City of El Paso under the terms of such Permit as this Honorable Board shall see fit to grant in these proceedings, shall stand expressly conditioned by and made subject to the terms and conditions of that certain Contract between the City of El Paso, Applicant, and El Paso County Water Improvement District No. One, hereinabove referred to, copy of which is attached hereto, marked for identification Exhibit "A", as such contract has been interpreted, and as so interpreted approved by the Secretary of the Interior in his letters referred to in Article IV hereof.

Done this 1st day of December, A. D. 1949.

CITY OF EL PASO,
Applicant,
By D. L. P. DUKE,
Mayor,
JOS. G. BENNIS,
Its Attorney of Record.
EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO ONE,
By P. F. BRINKMAN,
President,
LOUIS A. SCOTT,
Counsel of Record.

UNITED STATES OF AMERICA and the DEPARTMENT OF THE INTERIOR OF THE UNITED STATES OF AMERICA, RIO GRANDE PROJECT,

By SPENCER L. BAIRD,
Regional Counsel of Bureau of Reclamation, Attorney of Record.

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. ONE,

By RICHARD H. FEUILLE,
Attorney of Record.

FORT QUITMAN LAND COMPANY, SAM H. COOK, T. D. SHEPPARD, KENZIE H. TURNER, EARL BEASLEY, W. E. UPCHURCH S. S. UPCHURCH, RONALD MILLER, A. B. CATHEY, T. D. LOVELADY, PAUL O. DAVIDSON, ROY H. DAVIDSON, R. C. IVEY, and R. T. HOOVER, JR., JOSEPH R. HOOVER AND LOUANN HOOVER FEUILLE, owners of HOOVER-HOOVER-HOOVER FARMS,

By RICHARD H. FEUILLE,
Atorney of Record.

OTHER LAND OWNERS OF HUDSPETH COUNTY, PROTESTANTS HEREIN,

By RICHARD H. FEUILLE,
Attorney of Record.

Mr. Edwards:

We next offer document—it is three pages together but all together is marked "Plaintiff's Exhibit No. 34" (Court Reporter marks same), which is an agreement signed by the City of El Paso by D. L. P. Duke, Mayor, and the El Paso County Water Improvement District No. 1 by L. D. McComas, on the 22nd of June of 1950, and the resolutions of the City and the District.

Mr. Guinn:

We would like the same objection, Your Honor, in rlation to the same matter.

The Court:

All right. Overruled.

Plaintiff's Exhibit 34, read by Mr. Edwards, having been admitted in evidence, reads in words and figures as follows:

"P-34"

Agreement.

To avoid any question or controversy, it is agreed that the Permit to Appropriate Public Waters of the State of Texas, No. 1535, granted to the City of El Paso by the Board of Water Engineers of the State of Texas on May 8, 1950, is subject to the contract of August 10, 1949, between the City of El Paso and El Paso County Water Improvement District No. 1,

as clarified and interpreted by letters dated September 23, 1949, from the Secretary of the Interior to the Mayor of El Paso and the General Manager of said Water Improvement District. The parties recognize that said contract, or the stipulation, dated December 1, 1949, and filed with the Board of Water Engineers, to the effect that any award or permit granted by the Board should be subject to the contract of August 10, 1949.

Witness the following signatures this 22nd day of June, 1950.

THE CITY OF EL PASO,
By D L. P. DUKE,
Mayor.

Attest:
(S.) W. R. COLLINS,
City Clerk.
(Seal)

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
By (S) L. D. McCOMAS,
President.

Attest:
(S.) FRANCIS J. WARNOCK,
Secretary.
(Seal)

Certified Copy of Resolution.

On motion of Mr. Summers, seconded by Mr. Briggs, the following resolution was unanimously adopted:

Resolved, that L. D. McComas and Francis Warnock, President and Secretary, respectively, of this

District, be and they are hereby authorized to sign for and on behalf of this District an agreement with the City of El Paso, Texas, stipulating and providing that the permit to appropriate public waters of the State of Texas, No. 1535, granted to the City of El Paso by the Board of Water Engineers of the State of Texas on May 8, 1950, is subject to the contract of August 10, 1949, between the City of El Paso and El Paso County Water Improvement District No. 1, as clarified and interpreted by letters dated September 23, 1949 from the Secretary of the Interior to the Mayor of El Paso and the General Manager of this District.

I, Francis Warnock, Secretary of El Paso County Water Improvement District No. 1, certify the above to be a true and correct copy of a resolution adopted by the Board of Directors of said District at a meeting duly convened and held in the City of El Paso, Texas, on the 5th day of July, 1950, at which a quorum was present and acting throughout, and that said resolution is still in force and effect.

Given Under My Hand and the Seal of the District on this 5th day of July, 1950.

(S.) FRANCIS J. WARNOCK.

(Seal) Secretary of El Paso County Water Improvement District No. 1.

Resolution.

Be it Resolved by the City Council of the City of El Paso:

That the Mayor be authorized to sign on behalf of the City an agreement with the El Paso County Water Improvement District No. 1 recognizing that the permit to appropriate public waters of the State of Texas, No. 1535, granted to the City of El Paso by the Board of Water Engineers of the State of Texas on May 8, 1950, is subject to the contract of August 10, 1949, between the City of El Paso and El Paso County Water Improvement District No. 1, as clarified and interpreted by letters dated September 23, 1949 from the Secretary of the Interior to the Mayor of El Paso and the General Manager of said Water Improvement District.

Adopted this 22nd day of June, 1950.

(S.) D. L. P. DUKE.
Mayor

Attest:
(S.) W. R. COLLINS.
City Clerk.

. . . . . .

At this point the following testimony from the deposition of Mayor Fred T. Hervey was read into the record, with Mr. Edwards reading the questions and Mr. Scott reading the answers:

Questions by Mr. Edwards:
Question: Will you state your name, please, sir?
Answer: Fred Hervey.

Question: You are the Mayor of the City of El Paso?

Answer: Yes, sir.

Question: And have been since sometime in April of 1951?

Answer: Yes, sir."

Mr. Edwards:

Down to the bottom of the page, the last question at the bottom.

"Question: I would like to ask you some questions concerning the sworn answers you made to requests propounded to you by the Plaintiffs in this case, the first one being No. 1, wherein the defendant was requested to admit that "the defendant, City of El Paso, is a municipal corporation organized and existing under and by virtue of the laws of the State of Texas, having as its executive officers a mayor and four aldermen, operating under a home rule charter since the year 1917. Your answer to that was: The Defendant admits the facts stated in Request Numbered 1, excepting that portion as follows: "operating under a home rule charter since the year 1917." which portion it denies. Mr. Hervey, what do you say is the kind of charter that the City of El Paso has operated under since 1917.

Answer: Well, it is operating under a charter known as the home rule, but in 1912 the State Constitution was amended to provide for home rule cities, and we believe we have been operating under that since 1912, and in 1921, which was the first amendment to our present charter. We find nothing about the year 1917.

Question. Well, but is it your contention that the City of El Paso is not a home rule city?

Answer: No, sir

Question: That would be the purport of your answer where you deny it has been operating under a home rule charter since the year 1917. Was that an inadvertent reply on your part,

Answer: Well, we don't know why you said 1917 because we were operating before that time as a home rule city, prior to 1917, and we don't know why the year you chose was 1917.

Question: But, as, I understand you now, you do admit as a fact that the City of El Paso has been operating under a home rule charter since 1917?

Answer: Well, it has been operating before 1917.

Question: Well, I won't argue with you about that.

Answer: In other words, the main thing, the State of Texas authorized home rule cities prior to 1917. The first thing that we have any record of was an amendment in 1921 under that home rule.

Question: All that we are interested in establishing is that El Paso is a home rule city, and has been operating under a home rule charter, is operating now and has been for a number of years: that is all we are interested in?

Answer: That is right."

Mr. Edwards;

Next turn to Page 24. At the bottom of the page, the last question there.

"Question: Now, let us take a look at this contract of February 18, 1941. Mr. Hervey, do you have a copy of this contract? (To Mr. Sims) You have a copy of it over there. Let him have a copy of it so he can follow it along. I call your attention to Paragraph 6 on Page 6 of that contract which reads: 'Whereas,

the City for the purpose of securing a supplemental municipal water supply from the project water supply without interference to the water supply of other District water right lands, proposes to acquire not to exceed two thousand acres of District water right lands, and desires to receive each year from the project water supply an amount of water not to exceed the amount of water which such acquired lands would be entitled to receive from said water supply for the respective year, if held in private ownership of qualified project landowners, which will in no event be in excess of three and one-half (3½) acre-feet of water a year for each acre of such acquired land;' Now, Mr. Hervey, pursuant to that paragraph 6, the City did go ahead and acquire land in pursuance of that paragraph in that contract, didn't it?

Answer: Well, under the terms of this contract, which is illegal—

Question: Now, just a minute, before you go any further, Mr. Hervey, I would like for you to answer my questions and not go off into something else. The Court will determine whether or not the contract is legal or illegal I am directing your attention to that Paragraph 6 and I am asking you if it isn't a fact that pursuant to that Paragraph 6 the City did go ahead and acquire some water right land?

Answer: The City acquired land. I don't know whether it was pursuant to Paragraph 6 or not, but it did acquire land.

Question: It wasn't pursuant to anything else that you know of by way of a contract with the Government or anybody else, was it?

Answer: I don't know what it was pursuant of but they did acquire land.

Question: They did acquire land and they did not acquire land in excess of two thousand acres, did they?

Answer: No, but they did acquire land in excess of one hundred and sixty acres, and one hundred and sixty acres was the lawful amount that they could acquire.

Question: I don't recall having asked you anything about that. Has that got anything to do with the question that I asked you?

Answer: Well, it makes the contract illegal.

Question: Oh, does it? On Page 7, Paragraph 8, is a requirement that "The City shall provide, without cost to the District or the United States, in such location and in accordance with such plans and specifications and construction practices as may be approved by the Project Superintendent, suitable facilities for diversion of water from the Rio Grande or the project workds. . ." Now, Mr. Hervey, pursuant to that Paragraph 8 the City did submit to the Project Superintendent plans for a water treatment plant, did they not, which contained diversion plans for diversion of water out of the Franklin Canal?

Answer: The City did construct a water withdrawal facility from the Rio Grande but not pursuant that I know of to Paragraph 8.

Question: Now, let's go back and see if I can get an answer to the question that I asked you."

Mr. Edwards:

Here the question was repeated by the Court Reporter.

"Question: Did they submit such plans to the Project Superintendent?

Answer: I do not know whether they submitted plans or not. They did build a water withdrawal facility in the Rio Grande. To my knowledge, they didn't have to have the permission of the Independent Water District inasmuch as they owned the ground up to the middle of the river and they could have built a withdrawal plant at any time that they so wished.

Question: Maybe so, but this Paragraph 8 here, concerning which I am now asking you some questions, says that the City shall provide, without cost to the District or the United States, suitable facilities for diversion of water from the Rio Grande. They did that, didn't they?

Answer: Well, as I said before—

Question: Did they or not?

Answer: They did construct a diversion withdrawal facility.

Question: Without cost to the District or the United States?

Answer: They certainly did, without cost to the District and without cost to the United Staes.

Question: And that was in 1942 and 1943, shortly after this contract was executed, wasn't it?

Answer: I believe it was after this contract was executed, yes, sir."

Mr. Edwards:

Next, turn to Page 30, commencing with the second question down.

"Question: I call your attention to Paragraph 10(a) on Page 9 of this contract, which reads: 'Before delivery of water to the City as provided in Article 9 hereof and on or before January 31, 1941, in the event the City has acquired lands prior to that date, and

thereafter, as to any acquired lands subsequently acquired by the City and within ten (10) days of such subsequent acquisition, the City's Superintendent shall deliver to the Manager:

(1) Evidence of the City's ownership of acquired lands.

(2) A power of attorney duly executed on behalf of the City, authorizing the District as attorney in fact for the City to offer for sale, and sell and convey to the highest and best bidder, who shall be a qualified landowner, for cash at public auction after notice of such sale published once a week for three consecutive weeks in a newspaper of general circulation in El Paso County, Texas, any of said lands held by the City after the expiration of ninety (90) days from the effective date of the termination of the City's right to receive water under the provisions of this agreement as provided for in Article 13(a) hereof.' The City complied with that provision of the contract, didn't it, Mr. Hervey?

Answer: I do not know.

Question: In 1941 Mr. Ashley G. Classen was the Superintendent of your Water Department, wasn't he?

Answer: I believe he was, yes, sir.

Question: I hand to you a letter dated July 28, 1941, signed by Ashley G. Classen, Superintendent, directed to Mr. Roland Harwell, Manager, El Paso County Water Improvement District No. 1, El Paso, Texas. Mr. Harwell was the Manager of the El Paso County Water Improvement District No. 1 at that time, wasn't he?

Answer: I do not know.

Question: Will you read that letter, please, sir? Just look it over and then I will ask you about it.

(Witness examines letter.)

Question: You have read that over, haven't you, Mr. Hervey?

Answer: Yes, sir.

Question: And that shows that on that date, July 28, 1941, Mr. Classen, the Superintendent of the Water Department submitted to Mr. Roland Harwell, Manager of the El Paso County Water Improvement District No. 1, a list of three tracts of land which the City was contemplating buying and notified the District of such fact pursuant to that provision of the contract, that speaks for iself, doesn't it?

Answer: It appears that it does, yes, sir

Question: And I will ask you to examine Mr. Harwell's reply to Mr. Classen, under date of August 4, 1941, a carbon copy from the records of the district?

Answer: Yes, sir.

Question: And that shows that Mr. Harwell, as the Manager of the District, advised Mr. Classen that the proposed purchase would not interfere with the efficient operation of the District or materially impair the economical status of any community therein and is accordingly approved?

Answer: Yes, sir.

Question: That is correct, isn't it?

Answer: Yes, sir, that speaks for itself.

Question: Mr. Hervey, Mr. R. F. Momsen was Assistant City Attorney on February 11, 1942, wasn't he?

Answer: I don't know just exactly what time he served but I do know he was.

Question: Well, will you examine this letter, which appears on City stationery, signed by Mr. Momsen?

Answer: February 11, 1952?

Question: 1942?

Answer: Yes, sir, 1942.

Question: And as shown in this, Mr. Momsen, as Assistant City Attorney, on February 11, 1942, submitted to the El Paso County Water Improvement District No. 1, by letter bearing that date, attention Mr. Harwell, the matter of the City's acquisition of some more land. That is true, isn't it?

Answer: Let's see, is it some more or the same?

Question: (Mr. Edwards shows letter again to witness.)

Answer: Yes, sir, there is some description there.

Question: Of land which the City was going to acquire?

Answer: That is right.

Question: And I will ask you to examine Mr. Harwell's reply of February 12, 1942?

Answer: Yes, sir, February 12, 1942.

Question: Yes, and Mr. Harwell approved the acquisition of that land by the City as requested by Mr. Momsen as Assistant City Attorney, didn't he?

Answer: Yes

Question: Mr. Hervey, I hand to you another letter on the City's stationery, signed by R. F. Momsen, Assistant City Attorney, dated August 28, 1942, directed to Mr. Roland Harwell, El Paso National Bank Building, El Paso, Texas, and ask you to examine that?

Answer: Yes, sir.

Question: And in that letter Mr. Momsen submitted to Mr. Harwell for his approval a description of some land which the City desired to acquire under that contract, didn't he?

Answer: Yes, sir, but each acre that they acquired over one hundred and sixty was illegal."

Mr. Edwards:

Skip to the next question.

"Question: I will ask you to examine this reply of Mr. Harwell of September 10, 1942?

Answer: Yes, sir.

Question: That shows that on that date, September 10, 1942, Mr. Harwell, as Manager of the District, approved the acquisition of the land mentioned by Mr. Momsen in his letter of August 28, 1942?

Answer: Yes, sir.

Question: That is correct, isn't it?

Answer: Yes, sir.

Question: I show you another letter from Mr. R. F. Momsen, Assistant City Attorney, directed to El Paso County Water Improvement District No. 1, under date of September 18, 1942, attention of Mr. Harwell, pointing out that the City desired to acquire certain tracts of land?

Answer: Yes, sir.

Question: That is correct, is it not?

Answer: Yes, sir.

Question: And also the reply of Mr. Harwell, under date of September 25, 1942, wherein Mr. Harwell, for the District, approved that acquisition by the City?

Answer: Yes.

Question: That is correct, isn't it?

Answer: Yes, sir.

Question: I show you another etter from Mr. R. F. Momsen, Assistant City Attorney, to El Paso County Water Improvement District No. 1, dated October 5, 1942, calling to Mr. Harwell's attention the fact that

the City of El Paso was interested in the purchase of certain properties, describing them, and asking whether or not the purchase of the above property by the City and its use in connection with its water treatment plant would interfere with the successful operation of the District or materially impair the economical status of any community within the District, accompanied by another letter of October 26, 1942, from Mr. R. F. Momsen, Assistant City Attorney, to El Paso County Water Improvement District No. 1, setting out two additional tracts of land there, and requesting approval as to them, and also hand to you carbon copy of Mr. Harwell's reply of November 5, 1942, with reference to both letters?

Answer: I am sure they are right.

Question: Wherein Mr. Harwell approved that acquisition by the City. That is correct, isn't it?

Answer: Yes, sir.

Question: Mr. Hervey, I show you another letter of December 22, 1942, from Mr. R. F. Momsen, Assistant City Attorney, to El Paso County Water Users Association, attention of Mr. Harwell, stating that the City is considering the purchase of another tract of land. That is correct, is it not?

Answer: Yes, sir.

Question: I hand to you another letter dated January 4, 1943, from R. F. Momsen, Assistant City Attorney, to El Paso County Water Improvement District, attention of Mr. Harwell, showing that the City contemplates the purchase of about eighteen acres of land and asking for approval on that, and also carbon copy of Mr. Harwell's reply under date of January 6, 1943, approving the purchase?

Answer: Yes, sir.

Question: That is correct, is it not?

Answer: Yes, sir.

Question: I show you letters dated January 13, 1943; January 15, 1943; and January 27, 1943; all from R. F. Momsen, Assistant City Attorney, to Mr. Roland Harwell, El Paso County Water Improvement District No. 1, setting forth the description of various tracts of land which the City desires to purchase and asking for approval; and also show you carbon copy of Mr. Harwell's reply of February 5, 1943, approving those purchases?

Answer: Yes, sir.

Question: That is correct, is it not?

Answer: Yes, sir.

Question: I show you a letter dated February 2, 1943, from R. F. Momsen, Assistant City Attorney, to Mr. Roland Harwell; El Paso County Water Improvement District No. 1, setting out that the City is contemplating purchasing additional tracts of land and asking for approval, and show you in connection therewith carbon copy of a letter from Mr. Harwell dated February 22, 1943, addressed to Mr. Momsen, approving that purchase?

Answer: Yes, sir.

Question: That is correct, is it not?

Answer: Yes, sir.

Question: I show you another letter from Mr R. F. Momsen, Assistant City Attorney, dated May 20, 1943, addressed to El Paso County Water Improvement District No. 1, attention of Mr. Harwell, setting out the contemplation on the part of the City of purchasing the property therein described. That is correct, is it not?

Answer: Yes, sir.

Question: I hand you a letter on the stationery of the City of El Paso, Department of Water and Sewer-

age, signed by Ashley G. Classen, Superintendent, under date of November 10, 1943, addressed to El Paso County Water Improvement District No. 1, attention of Mr. Roland Harwell, Manager, which reads in the opening paragraph as follows: 'Gentlemen: In accordance with the provisions of Section 9(a) of a contract to supply water to the City of El Paso for municipal purposes, dated February 18, 1941, notice is hereby given that the City of El Paso, Texas, as of November 1, 1943, has acquired and has clear title to a total of 1,137.23 acres of first-class water right acreage being contained in the various tracts in the El Paso County Water Improvement District No. 1, designated and described as follows:' There it is (indicating), setting out the description of the property, totalling 1,137.23, and stating: 'Effective January 1, 1944, the City will begin to take delivery of that quantity of water which the above-described acquired land held by the City will be entitled to receive from the Project water supply. It is contemplated that the quantity taken each day will vary from a minimum of nine acre-feet to a maximum of twenty-one acre-feet. Evidence of the City's ownership of the acquired land above-described may be found in the deed records at the County Clerk's Office in El Paso County. In accordance with Section 10(a)(2) of the aforesaid contract, providing for a power of attorney executed on behalf of the City of El Paso, authorizing the District, as attorney in fact for the City to offer for sale, and so forth, may we suggest that the arrangements for compliance with this provision by the City be made by the duly designated legal representatives of the City and District. Yours very truly, Ashley G. Classen Superintendent.' Do you recognize that as being the original of the letter written by Mr. Classen, Mr. Hervey?

Answer: Looks like Mr. Classen, and Mr. Momsen, and Mr. Umbenhauer didn't know about that one hundred and sixty acres.

Question: I believe they did, Mr. Hervey. You do recognize that as being Mr. Classen's signature, don't you, Mr. Hervey?

Answer: Yes, sir.

Question: And attached to this is the carbon copy of a letter from Mr. Harwell to the City of El Paso, and also to the Superintendent, U. S. Bureau of Reclamation, Rio Grande Project—before we get along to that, however, Mr. Hervey, I want to call your attention to something further here in Mr. Classen's letter, particularly this language here, where Mr. Classen says: 'Effective January 1, 1944, the City will begin to take delivery of that quantity of water which the above-described acquired land held by the City will be entitled to receive from the Project water supply.' I believe you said you couldn't imagine what the Project was, back at the start where you said you didn't know what the Rio Grande Project was?

Answer: I don't think that says 'Rio Grande Project.'

Question: What project do you think it referred to?

Answer: I really don't know.

Question: You haven't any idea?

Answer: I would assume—well, the letter was addressed to the Independent Water District, was it not?

Question: Yes?

Answer: I assume they were talking about the Independent Water District No. 1 Project.

Question: But I believe you stated you didn't know whether that District was a part of the Rio Grande Project?

Answer: That is right.

Question: And you don't know what Project Mr. Classen had reference to here?

Answer: No, sir.

Question: I hand to you a carbon copy of a letter of Mr. Harwell addressed to the City of El Paso and the Superintendent, United States Bureau of Reclamation, concerning which I started to make some reference a while ago, wherein he says: 'Pursuant to the contract entered into on the 18th day of February, 1941, by the United States of America, the City of El Paso, and the El Paso County Water Improvement District No. 1, and partiularly Article 11(d) thereof, notice is hereby given that the advance estimated charge for the year 1944 on account of the land acquired by the City of El Paso as of January 1, 1944, is $6,147.17. Schedule showing the acquired lands herein covered, together with the advance estimated charges on each parcel thereof, is attached to this communication.' I wish you would examine that, Mr. Hervey. That is a copy of a letter that was received by the City, is it not?

Answer: I assume that it is, yes, sir.

Question: And the City paid that amount, $6,147.17, didn't it?

Answer: I really don't know.

Question: Mr. Hervey, I hand to you herewith another document which is indorsed, 'Power of Attorney, City of El Paso, Texas, to El Paso County Water Improvement District No. 1' and ask you to examine that please, sir?

Answer: Well, you see, this refers to the El Paso County Water Improvement District—

Question: I am just asking you to examine the document, then I will ask you some questions on it later. (Witness examines document.) Mr. Hervey, this document which I have just handed you is, as a mat-

ter of fact, several documents bradded together, is it not?

Answer: Seems to be, yes, sir.

Question: The first one is a signed copy of a Resolution by the City Council of the City of El Paso, which reads:

"Whereas, on the 18th day of February, 1941, the City of El Paso, Texas, entered into a contract with the United States of America and the El Paso County Water Improvement District No. 1, under and by virtue of the terms of which the City was to acquire a supplemental water supply; and

Whereas, the said contract requires the City of El Paso, Texas, to execute a power of attorney to the El Paso County Water Improvement District No. 1 as to all acquired lands, authorizing said District as attorney in fact for the City to offer for sale, and sell and convey said acquired lands, under certain terms and conditions as described in said contract; and

Whereas, the City now has in operation its new water treatment plant and desires to comply with the terms of said contract by executing said power of attorney;

Now, Therefore, Be It Resolved, by the City Council of the City of El Paso that J. E. Anderson be and he is hereby directed to execute on behalf of the City of El Paso the attached form of power of attorney to the El Paso County Water Improvement District No. 1.

Passed and Approved This 14th day of January, A. D. 1944. Signed J. E. Anderson.' That is the signature of Mayor J. E. Anderson, isn't it?

Answer: Yes, sir. It appears—"

Mr. Edwards:

We don't offer the voluntary statements that he made there.

"Question: Now, this is Mr. William Collins' signature, isn't it, *attesting* there?

Answer: Yes, sir.

Question: Now, this Resolution is accompanied by a power of attorney signed 'City of El Paso, Texas, by J. E. Anderson, Mayor,' dated the 14th of January, 1944, to the El Paso County Water Improvement District No. 1, giving to it the powers required in this contract of February 18, 1941. That is a fact, isn't it?

Answer: You say this contract is giving the power of what, Attorney?

Question: Power of Attorney to the District as required under the terms of the contract of February 18, 1941?

Answer: It appears that he did that, yes, sir.

Question: Yes, sir, and they attached to the Power of Attorney a copy of the contract itself, didn't they? A copy of the contract of February 18, 1941, is attached to that Power of Attorney, isn't it?

Answer: It is attached to it, all right.

Question: On Page 11 of this contract, Mr. Hervey, Paragraph 10(e), up at the top, reads: 'No water shall be delivered to acquired lands while the legal and equitable title thereto remains in the City or to any acquired land in any water year when such land

was included in the computation of the advance estimated charge or the actual charge for such water year: Provided, That subject to the compliance by the City with the provisions of this contract, including the provisions of Article 11 relating to the payments to be made to the United States, until the City's diversion works and appurtenant structures are completed and in actual operation water may be delivered to not to exceed one hundred and sixty acres of such acquired land in the same manner and under the terms and conditions, not in conflict with the provisions of this contract, as if said lands were in private ownership of a qualified project landowner.' That provision was carried out, wasn't it?

Answer: There was no compensation to the City of El Paso at all. Inasmuch as the City was putting in 12 to 15 million gallons of effluent a day and the Rio Grande being a common carrier it had the right to withdraw the same amount of water they put in. The City of El Paso got no benefit from this contract whatsoever.

Question: Would you mind answering my question?

Answer: I have forgotten it.

Mr. Edwards:

Will you repeat the question, Mr. Valenzuela?

(The reporter complied.)

Question: Was it, or wasn't it?

Answer: I don't know if it was carried out or not.

Question: I call your attention to Page 11, Paragraph 10(f): 'The City will acquire its lands, only after consultation with the Manager. . .' They carried out that provision, didn't they, as shown by these letters by Mr. Momsen and Mr. Classen?

Answer: It appears that they did.

Question: Page 12, Paragraph 10(h): 'The City shall not acquire or retain title to District water right lands so as to hold, at any time, an aggregate amount thereof in excess of 2,000 acres.' The City did not at any time acquire or retain the title to water right lands in excess of two thousand acres, did it?

Answer: Not that I know of.

Question: Pages 12 and 13, Paragraph 11(a) through 11(g), I will ask you to read those over, please.

Answer: 11(a)?

Question: Through 11(g): 11(g) is over on Page 14.

Answer: All right.

Question: Have you read that?

Answer: Yes, sir.

Question: Now, that is a provision of the 1941 contract relative to the terms of payment by the City, is it not?

Answer: Well—

Question: As set out in Paragraphs 11(a) through 11(g)?

Answer: Well, it appears to be the payment for the water withdrawn from the Rio Grande in accordance to the land owned by the City.

Question: Yes, and the City made all payments under that 1941 contract pursuant to these provisions up until it was modified by the subsequent contract of 1944, didn't it?

Answer: I believe they did, yes, sir.

Question: On Page 18, Paragraph 15 provides that: "Before delivery of water to the City under the provisions of this contract the City shall, without cost to the United States or to the District, construct in a manner, at a location at the point of delivery of water to the City, in accordance with such plans and specifications as hereafter shall have been approved

by the Project Superintendent, an adequate measuring device for the measurement of water delivered to the City under the provisions of this contract; and the City shall maintain said measuring device in a condition satisfactory to the Project Superintendent." The City did that, didn't they, Mr. Hervey?

Answer: It appears that they did, yes, sir."

Mr. Edwards:

Next, to Page 48, up at the top, second question.

"Question: Now, Mr. Hervey, will you take that contract of 1941 and point out any place in that contract, from beginning to end, that the City didn't recognize as being valid and binding on it and didn't carry out?

Answer: The city officials at that time entered into a contract--

Question: Just wait a minute now.

(The former question was repeated.)

Answer: Well, under the 'Definition of Terms' here it says: '(b) Reclamation Law—the Act of June 17, 1902 (32 Stat. 388), and acts amendatory there or supplementary thereto, and in particular the Act of February 21, 1920 (41 Stat. 451).' I believe that that law calls for no more than one hundred and sixty acres, and while this contract says that the City has two thousand acres, I think that certainly the City of El Paso and the Improvement District weren't in keeping with the law.

Question: Well, that is a very interesting discussion of the law, Mr. Hervey, but you still haven't answered my question. There isn't a single obligation imposed on the City by that contract that they didn't undertake to live up to, is there, Mr. Hervey, not a one?

Answer: I can't find any at this time."

Mr. Edwards:

Now on Page 50 at the top.

"Question: Mr. Hervey, just before the Noon recess I had invited your attention to the contract of December 1, 1944 between the United States and the City of El Paso, and the District, with reference to Request Numbered 27 for Admissions of Fact, which reads as follows: 'Following the execution of the written contract dated December 1, 1944, between the United States of America, the City of El Paso, the El Paso County Water Improvement District No. 1, and the Elephant Butte Irrigation District, the City of El Paso recognized said contract as being valid and binding on it, and accepted the benefits conferred on it thereby, and recognized the obligations imposed on it by the terms thereof.' That statement or request was denied. Now, if you will turn to the contract of December 1, 1944, I will call your attention to a number of items all at one time, so as not to unduly prolong the thing. Page 3, Paragraph 6, if you will take a look at that; and Page 4, Paragraph 7; and Page 5, Paragraph 8(b); and Page 6, Paragraph 9(e), and 9(h)—

Answer: Did you say 9(h)?

Question: Yes, Paragraph 9(h) on Page 6?

Answer: O. K.

Question: And on Page 7, Paragraph 10(a); Page 9, Paragraph 13?

Answer: All right.

Question: You referred to all of those, have you?

Answer: I have looked at them and marked them.

Question: Now, those paragraphs that I called your attention to are substantially the same as the similar paragraphs in the contract of February 18, 1941, are they not?

Answer: Yes.

Question: And, again without going through each one of them at length, the City did comply with each of the provisions in each of those paragraphs just the same as they did with reference to the paragraphs that we went into in minute detail before noon with reference to the contract of February 18, 1941, didn't they?

Answer: Well, we admit the existence of the contract, and we do say that the contract is not legal and we received no benefits from them other than what we had legal rights to anyway, but that it appears that the City did make an effort to comply with the provisions of this contract.

Question: Simplifying the matter by eliminating the voluntary expressions which you have injected into the record, I gather that what you intend to say is that the City did comply with all of the requirements that were made of it by the terms of this contract in these various particulars that we have discussed this morning and here now, as applied to the contract of 1944, is that right?

Answer: Well, I believe that is correct, yes, sir.

Question: The City met all of its payments under this last contract of December 1, 1944, until February 4, 1952, when it was delinquent $2,371.70, which was the amount claimed by the District to be due from the City under Paragraph 7, Item 1, isn't that correct?"

Mr. Edwards:

Now skip down to—

Mr. Grambling:

He should be allowed to answer that question.

Mr. Edwards:
All right. If you want that:

"Answer: The City paid what we consider illegal charges.
Question: Just a minute. Wait just a minute, please. Will you please answer my question, instead of going off into something else? If you would like to make a speech at the end of this I wouldn't have any objection to your making it, but will you just hold it off until we get through here? Answer my questions and then I will give you the floor.

Mr. Edwards:
Will you repeat the question for him. Mr. Valenzuela?

(The reporter complied.)

Answer: We made payments to the District of charges that they requested."

Mr. Edwards:
Now to Page 54.

"Question: Mr. Hervey, what was that $2,371.70 that you didn't pay?
Answer: That was charges that the District made for something that they did not own, that they could not sell, and we paid them for a bill that was not legal. I mean, that was the money that they wanted us to pay which we refused to pay.
Question: Is that $2,371.70 the amount that the District claimed was due under Paragraph 7, Item 1, of this contract of December 1, 1944?

Answer: Well, it is for water that was billed to us that they claimed was excess water over the allotment —and you want to go back and look at the paragraph, what is it now?

Question: Paragraph 7, Item 1?

Answer: Paragraph 7, Item 1. On what page is that?

Question: I think that is on Page—No, wait a minute. That is another contract. That's the contract of August 10, 1949. I beg your pardon, that is the wrong contract. It is the contract of August 10, 1949, Mr. Hervey. I am sorry. Here it is, the contract between the City of El Paso and the El Paso County Water Improvement District No. 1, dated the 10th day of August, 1949, a copy of which is attached to the stipulation before the Board of Water Engineers. Look on Page 2 of Exhibit A there.

Answer: Have I got the right one here?

Question: No, that isn't it. There it is.

Answer: Page 2?

Question: Yes. Page 2, Paragraph 7, Item (1), of the contract of August 10, 1949. That is the one that I intended to direct the question to as to whether or not the City had met all payments under that contract until February 4, 1952, at which time the District claimed it was delinquent $2,371.70, which was the amount claimed by the District to be due from the City under that contract?

Answer: Yes. That is under Paragraph 7, Item (1)?

Question: That is correct?

Answer: Yes."

Mr. Edwards:

Now Page 56, at the top

"Question: Now, Mr. Hervey, it is a fact, isn't it, that following the execution of the written contract

dated August 10, 1949, which is the one you have just been looking at, between the City of El Paso and the El Paso County Water Improvement District No. 1, the City of El Paso did in fact use Project works therein mentioned for the purposes of that contract as set forth therein?

Answer: I don't quite understand the question.

Question: After that contract of August 10, 1949 was signed, the City did go ahead and use the Project works in the manner to which reference was made in that contract, didn't it?

Answer: Well, now, let's see, is the American Dam part of the Projects of the Independent Water District?

Question: Well, the Water District itself doesn't own the facilities. They are owned by the United States."

The Court:

This looks like a convenient place to stop for the day.

Whereupon a recess was had from 5:00 o'clock P.M. on November 15, 1954 until 9:30 o'clock A.M. on November 16, 1954, at which time proceedings were resumed as follows:

The Court

All right. You were introducing some deposition testimony so you may resume.

Mr. Scott then got back on the stand to read the answers from Mayor Hervey's deposition and Mr. Edwards was again reading the questions therefrom.

Mr. Edwards:

Mr. Scott, will you turn to Page 56 of Mr. Hervey's deposition. When we adjourned yesterday afternoon, according to the way I have checked it here, I had read the second question from the bottom on Page 56.

"Question: Well, the Water District itself doesn't own the facilities. They are owned by the United States.

Answer: Yes. Well, we used the American Dam and we used the Canal, when the District took water out of the river; we wouldn't have to use the Canal if the District had left the water in the river.

Question: And you used the Franklin Canal and diverted water from the Franklin Canal into the City's water treatment plant in the manner contemplated by that contract, didn't you?

Answer: Well, I don't know whether contemplated by this contract or not, but we did use the Canal when the water was in the Canal and not in the river

Question: Now, Mr. Hervey, directing your attention to Request for Admission numbered 33, which reads: 'For the purpose of compelling litigation for its collection, the City of El Paso deliberately and intentionally withheld from the payment made to the El Paso County Water Improvement District No. 1 on February 1, 1952, the sum of $2,371.70 claimed by the District to be delinquent on January 31, 1952.' I believe that you answered that that wasn't done for the purpose of compelling litigation. Didn't you make the statement about that time that that was your reason for withholding that payment?

Answer: No, the reason for withholding the payment--

Question: No. Did you make the statement? Did you make the statement that that wa why you did it?

Answer: Well, if you remember right, we had a meeting at that time where we called together everybody and tried to get an agreement between us as to how we could settle this question without any lawsuits or without any litigation, and we were unable to arrive at any conclusion.

Question: I understand that, but didn't you later on make the statement that in order to compel litigation you withheld that $2,371.70, and when I say 'you' I mean the City, of course?

Answer: Well, I think it was my position that we ought to have sued the District. There might have been some statement made to the effect that the withholding of that money resulted in the lawsuit, but we—

Question: Well, didn't—Pardon me, I didn't mean to interrupt you?

Answer: We withheld the money because we didn't feel like we ligitimately owed it, and I think if there hadn't been some solution to the priblem, if the District hadn't sued we would have.

Question: All right, but in that connection didn't you make the statement, Mr. Hervey, that your reason for withholding that money was to compel litigation?

Answer: Well, I don't think I put it in those words.

Question: Didn't you say it substantially that way?

Answer: I think that it was pretty well recognized if the money wasn't paid that there would be a lawsuit one way or the other.

Question: Now, this sum of $2,371.70, which was withheld by the City on February 4, 1952, was in fact made up of items which in previous years had been paid without any question, isn't that a fact?

Answer: That is right. We—

Mr. Edwards:

I offer the first three words of it and the rest of it is a voluntary answer which we do not offer. Now, turn to Page 65, the first question at the top.

"Question: Well, I wish, for the purposes of the record, you would set out in as much detail as you can all of the different sources of supply for municipal water for El Paso?

Answer: Well, we have the wells in the upper valley that will produce about ten million gallons a day.

Question: Now, what was that? I didn't catch that.

Answer: That's the wells in the upper valley.

Question: Upper valley?

Answer: Yes, sir.

Question: All right, go ahead?

Answer: That will produce about ten million gallons a day. Then we have the wells out in the mesa, that will produce—I am not positive about these figures, now—but I say that they will produce about eighteen million gallons a day.

Question: Eighteen million?

Answer: Yes

Question: All right?

Answer: Then we have the water treatment plant, which will produce twenty million gallons a day."

Question: But do you get twenty million gallons a day from it?

Answer: No, not always.

Question: That is what I am asking, where you get it and how much you get?

Answer: Well, some days we have produced over twenty million gallons a day.

Question: Well, take it over a year-round average?

Answer: I don't believe I have those figures.

Question: You do know, it is a fact, isn't it, Mr. Hervey, that the greater portion of the City's water comes from wells?

Answer: Well, putting both types of wells together?

Question: Yes?

Answer: Yes, I think that the major portion of it comes from wells.

Question: What you get from the river is relatively a small part, isn't it?

Answer: But it may not be.

Question: I said it is relatively a small part?

Answer: I wouldn't say relatively a small part. I think we have expended a considerable amount of money putting that in down there, and it is not a small part. It is a smaller part than the wells."

Mr. Edwards:

Page 79, bottom of the page.

"Question: I call your attention to Request No. 63. 'During the year 1953 the City of El Paso withdrew water from the Franklin Canal or the Rio Grande in excess of the amount of water which the City of El Paso was entitled to take by reason of its ownership of first-class water right lands within the Rio Grande Federal Reclamation Project, and persisted in such excess withdrawals after it had been notified of its overdraft by the Rio Grande Project Superintendent.' You have denied that. On what basis?

Answer: Well, again, we do not recognize the Rio Grande Project, or the Federal Reclamation Project, I should say.

Question: You just don't recognize the Project at all, it doesn't exist as far as you are concerned?

Answer: Well, we don't recognize it in that name.

Question: In what name?

Answer: Well, we recognize the El Paso Water Improvement District No. 1 and—

Question: Which is the Texas unit of the Rio Grande Project, is it not?

Answer: I don't know.

Question: You don't know?

Answer: No.

Question: Go ahead?

Answer: And the water we took out of the Rio Grande river was, in our opinion, not owned by the El Paso Water Improvement District No. 1.

Question: Now, just a minute, is there anything in that question, or request, rather, No. 63, about the ownership of the water?

Answer: Well, you say, 'which the City of El Paso was entitled to take—'

Question: 'By reason of its ownership of first-class water right lands.'

Answer: No. Any water we took out of the Rio Grande was not 'by reason of its ownership of first-class water right lands.'

Question: What was it by reason of?

Answer: It was by reason that there was water running down the Rio Grande and that the Texas Board of Water Engineers had allocated 27,000 acre-feet to the City of El Paso.

Question: You are just brushing all these contracts aside; the contracts of February 18, 1941; December 1, 1944; August 10, 1949; and June 22, 1950, I think it is; all of those, as far as you are concerned, are just scraps of paper?

Answer: No, they are all illegal."

Mr. Edwards:

The last question on the bottom of the page.

"Question: Let's go back to No. 63, here, and see if we can get straight on what the facts are. The inquiry is made there if it isn't a fact that during the year 1953 the City of El Paso took water from the Franklin Canal or the Rio Grande, which was more than the amount of water the City would be entitled to take for its first-class water right lands. Now, it doesn't make any difference to me whether you call it within the Rio Grande Federal Reclamation Project, or El Paso County Water Improvement District No. 1, or what else, but let's just say that we are not referring to a project at all but are just mentioning those water right lands which are outside of the City limits of the City of El Paso, the City did take water in excess of the amount that it would have been entitled to take under the contracts by reason of its ownership of that land, no matter what project the land was in: that is a fact, isn't it?

Answer: We took water out of the Rio Grande that we were justly entitled to from the effluent that we were putting into the river and the amount of water allocated to us by the Texas Board of Water Engineers. We just took water—we didn't take it by reason of anything—we just took water, period, that belonged to us.

Question: Would you mind going back and answering my question?

Answer: Your question is—

Question: My question is one that I would like to have an answer to, either 'yes' or 'no', and I insist on having an answer to that question?

Answer: Will you repeat the question?

Mr. Edwards:

Mr. Valenzuela, will you go back and repeat my question, please?

(The reporter complied.)

Answer: We took water out of the Rio Grande in excess of what the Independent District No. 1 said we were entitled to, period.

Question: Were entitled to for those water right lands, is that what you mean?

Answer: Entitled to for—yeah, for those water right lands, that is all right.

Question: All right, that is what I have been trying to get for the last half hour. Now, No. 65, Mr. Hervey. 'The City of El Paso, in the years 1951, 1952 and 1953, has in fact taken from the Franklin Canal or from the Rio Grande itself, Project return flow water and has refused to pay for such water the amount of money uniformly charged by said District to other water right land owners for return flow water, and has refused to pay any sum whatever for such water, and the City is continuing such practice.' I believe that has been denied, and on what basis, Mr. Hervey?

Answer: We don't recognize that the return flow belonged to the Independent Water District No. 1. We do not recognize the Independent Water District No. 1's right to charge us for any use of the American Dam. We feel as though we have a right to take water out of the Rio Grande River that is rightfully our water, and that when the Independent Water District No. 1 diverts the flow from the Rio Grande River that we have the same rights in the canal that we would have had in the rights of the Rio Grande River.

Question: In other words, I take it from the answer which you have made that when you have said that you wouldn't recognize the Rio Grande Federal Reclamation Project you meant just exactly that, you didn't recognize the project and you claim that you have the right to take from the river all of the water needed by the City of El Paso regardless of the Rio Grande Federal Reclamation Project and El Paso County Water Improvement District No. 1, and whatever rights they may have?

Answer: Well, I think that is what this lawsuit is about, just to determine how much water we have rights to.

Question: I understand, but is that your position, the City's position?

Answer: Our position is that we certainly have rights in the Rio Grande, and we are very willing to let the Court decide what rights we do have in the Rio Grande."

Mr. Edwards:

Page 85, first question.

"Question: Mr. Hervey, we want to make a request of you here to go into the record, that you produce and attach to your deposition here, and as a part of it, true and correct copies of all progress reports of the United States Geological Survey which has been made to the City of El Paso on water investigations northeast of El Paso and up to the New Mexico line, and in the Canutillo area, including all letter reports, and memoranda, and matters of that sort, pertaining to the progress of their investigation for exploration of water in that area; and next, we would like to have the City's records of water pumped

from City wells in acre-feet each month beginning with January, 1943, grouped as follows: (a) The Mesa wells; (b) The Montana wells; (c) the valley wells, that is in the downtown section; and (d) the Canutillo wells. And also a statement as to the options which the City has secured on lands in the area northeast of El Paso and up to the New Mexico line, and in the Canutillo area also?

Answer: Well, I don't see the pertinency of that information and will bring them in on order of the judge.

Question: You refuse to bring them in unless ordered by the Court to do so?

Answer: Or unless advised by my attorneys.

Question: Well, we are not taking the deposition of your attorneys, Mr. Hervey. We are asking you to produce this information, which we think is highly relevant and material and pertinent to the matter which is to be presented to the Court. Now, do I understand—

Answer: Well, let's say that I will bring in the well pumping, and I will bring in—what else did you want?

Mr. Edwards:

Mr. Brockmoller, you want to make a memorandum of this? Of course, it will be in the record.

Mr. Brockmoller:

I will have to take it from the record.

Mr. Edwards:

All right, it is in the record.

Answer: The Well pumping. I don't believe I will bring in the data of the U.S.G.S. on the information on the Mesa or the Canutillo matters unless it has been made public by that time or unless the Judge so orders it.

Mr. Sims:
Well, they have made no final conclusion about that?

The Witness:
No.

Mr. Edwards:
We are just asking for those progress reports.

The Witness:
I will have to decline that unless so ordered by the Judge.

(Information furnished by Mr. Brockmoller is attached and made an exhibit and part of this deposition.)

Question: Mr. Hervey, judging from recent events, you are more or less allergic to newspapers and newspaper reporters, but they haven't always misquoted you, have they, Mr. Hervey?

Answer: Well, which paper have you got there?

Question: I have here the headline, full-page headline, of Sunday, December 30, 1951, of the El Paso Times. It says: El Paso Balks at Paying for 'Wild Water'. City to Ask Refunding of Payments. 'The City of El Paso.'—this is the opening statement here—'The City of El Paso will serve notice that no further

payments will be made for wild water taken from the Rio Grande or for the equivalent of sewage effluent returned to the river.' That is as of December 30, 1951. Was that correct?

Answer: I assume that the dates and everything are correct. I don't know how we gave the Independent Water District notice, but I think it was through a letter. How about it, fellows, how did we notify you?

District Representative:

I don't think you did, Mayor, I think you just quit paying.

Question: Now, this quotes His Honor, the Mayor: 'We have been paying for water over which they had no control and over which they had no beneficial use', Mayor Hervey said, 'as well as for water that did not result in injury or loss to users of the Water District. When we return twelve million gallons of effluent to the river there is no reason why we should pay for taking the same amount from the river. We do not interfere with the rights of any users of the District anywhere on the river.' Were you quoted substantially correct there?

Answer: Yes, sir.

Question: The El Paso Times of Saturday, September 27, 1952: Water Suit Certain, The Mayor Says. 'A lawsuit to settle El Paso's water rights in the Rio Grande is certain,' Mayor Hervey said Friday, 'the only question is when and where the suit will be filed.' Is that correctly quoted?

Answer: Yes, sir. You are reading a good newspaper there.

Question: I try to. Here is one from the Herald-Post of Friday, September 26, 1952: Mayor Outlines Problems in Water Court Battle. 'Plan to File Suit in Next Few Days.'

'The City will take its controversy with the El Paso County Water Improvement District over its water rights to Court here in the next few days', Mayor Hervey announced today. He explained the issues before a meeting of the City's Department Heads today. He said attorneys have instructions to file suit here rather than in Washington so that El Paso will stand a better chance of winning. The City is at odds with the District over these questions:

(1) Failure to receive credit for ten million gallons of sewage effluent it dumps into the Rio Grande daily. The City thinks it is entitled to get the ten million gallons back.

(2) Failure of the District to maintain bridges over the Franklin Canal and to build new ones.

(3) An attempt by the District to bill the City for the use of both the Rio Grande and Franklin Canal as a carrier for its river water.

(4) Validity of old contracts signed by the City and District over river water rights.'

Is that substantially correct?

Answer: Substantially correct. I think the thinking was that it was more expensive to file a suit in Washington than it was here. I don't think it was anything to do with a better chance to win.

Question: The El Paso Times, Thursday, September 25, 1952: 'Hervey Favors Early Lawsuit Over Water. The City had defaulted in the payment of a bill received from El Paso County Water Improvement District No. 1 calling for a $2300.00 payment for the use of the Franklin Canal facilities leading to

the plant.' Then, quoting Mayor Hervey: 'We had hoped that our action during the past summer would lead to the District and the Bureau of Reclamation taking us into Court for a showdown', the Mayor said, 'No suit has been filed and it begins to look as though any initiative will have to be with the City.' Is that a substantially correct quotation of what you said?

Answer: What does it say I said there?

Question: 'We had hoped that our action during the past summer would lead to the District and the Bureau of Reclamation taking us into Court for a showdown, the Mayor said.'

Answer: Well, I think that is substantially correct.

Question: In other words, doesn't that get us back to what I asked you as to why you withheld the $2,371.70?

Answer: Well, I don't think it made much difference. We had a meeting to try to get our views together. I think after that meeting, I don't think it made any difference who filed the lawsuit. If you fellows didn't file it we were going to. I think that the money was held back for more or less a showdown.

Question: In other words, it was to precipitate this suit that you held this money back?

Answer: Either for us to sue or you to sue."

Mr. Edwards:

Next page.

"Question: Well, the way you were quoted here in the Times of February 8, 1952, and I quote: 'We have been convinced for sometime that we would have to go to the Courts to establish our rights, and it might

as well come now as later', Mayor Hervey said, 'we are standing firm in our determination to take the water we believe we are entitled to with or without the consent of the Reclamation Bureau.' Are you correctly quoted there?

Answer: True."

Mr. Edwards:

Now we wish to offer in evidence the date attached to Mayor Hervey's deposition. Your Honor, shall we just leave it attached to the deposition and ask the reporter to identify it as Plaintiff's Exhibit 34-A or shall we detach it?

The Court:

I would say leave it in place.

Mr. Edwards:

All right. That will be Plaintiff's Exhibit 34-A, the data furnished by Mayor Hervey and attached to his deposition at the Plaintiff's request. It consists of four photostatic sheets.

(The statistical data accompanying Mayor Hervey's deposition was thereupon marked by the Court Reporter as Plaintiffs' Exhibits Nos. 34-a, 34-b and 34-c. However, these three exhibits have no bearing on points of appeal so all three exhibits Nos. 34-a, 34-b and 34-c are being omitted from the record on agreement of counsel.)

Mr. Edwards:

We would like to read into the record at this point, and this is not an exhibit number, certain of the requests for admission of facts by the plaintiffs and the defendant's answer thereto: (Reads).

"Pursuant to Rule No. 36 of the Federal Rules of Civil Procedure, plaintiffs El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs, W. L. Summers, and the United States of America request defendant City of El Paso within ten days after service of this request to admit, for the purpose of this action only, the truth of the following facts:

1. The defendant, City of El Paso, is a municipal corporation organized and existing under and by virtue of the laws of the State of Texas, having as its executive officers a mayor and four aldermen, operating under a home rule charter since the year 1917."

Mr. Scott:

(Reading) "The Defendant admits the facts stated in Request No. 1 excepting that portion as follows: 'operating under a home rule charter since the year 1917', which portion it denies."

Mr. Edwards:

"2. The Elephant Butte Reservoir was constructed by the United States Bureau of Reclamation across the channel of the Rio Grande in New Mexico with its dam being approximately one hundred miles north of the New Mexico-Texas boundary and was completed in the year 1916."

Mr. Scott:

"The Defendant admits Request Number Two."

Mr. Edwards:

"3. The Caballo Reservoir was constructed by the United States Bureau of Reclamation across the channel of the Rio Grande downstream from the Elephant Butte Reservoir with its dam approximately eighty miles north of the New Mexico-Texas boundary, and was completed in the year 1938."

Mr. Scott:

"The Defendant admits Request Number Three."

Mr. Edwards:

"10. J. E. Anderson was the duly elected, qualified, and acting mayor of the City of El Paso from April 13, 1939, to February 4, 1947."

Mr. Scott:

"The Defendant admits Request Number Ten." Well, their answer to that is "No.8" and admissions are made as to a number of requests in that same number eight.

Mr. Edwards:

Well, it includes ten?

Mr. Scott:

That is right.

Mr. Edwards:

"11. W. R. Collins was the duly appointed, qualified, and acting City Clerk of the City of El Paso from April 27, 1927, to August 31, 1953."

Mr. Scott:

"Defendant admits Request No. 11."

Mr. Edwards:

"12. D. L. P. Duke was the duly elected, qualified, and acting mayor of the City of El Paso from April 14, 1949, to April 12, 1951."

Mr. Scott:

"The Defendant admits Request No. Twelve."

Mr. Edwards:

"13. Brooks Travis was a duly elected, qualified, and acting alderman of the City of El Paso from April 13, 1939, to June 4, 1942."

Mr. Scott:

"The Defendant admits Request Number Thirteen."

Mr. Edwards:

"14. Harris Walthall was a duly elected, qualified and acting alderman of the City of El Paso from April 13, 1939, to January 18, 1945."

Mr. Scott:

"The Defendant admits Request Number Fourteen."

Mr. Edwards:

"15. J. Francis Morgan was a duly elected, qualified and acting alderman of the City of El Paso from April 13, 1939, to July 2, 1942."

Mr. Scott:

"The Defendant admits Request Number Fifteen."

Mr. Edwards:

"16. D. L. P. Duke was a duly elected, qualified and acting alderman of the City of El Paso from April 13, 1939, to February 27, 1947."

Mr. Scott:

"The Defendant admits Request Number Sixteen."

Mr. Edwards:

"17. On July 26, 1943, Francisco Mendoza, as plaintiff, filed a suit against the City of El Paso, as defendant, in the District Court of El Paso County, Texas, Forty-First Judicial District, in a suit numbered 53430 on the docket of that Court, wherein the plaintiff sought to recover damages against the defendant therein, being the same defendant herein, alleged to have been sustained by plaintiff when his minor son fell into the Franklin Canal from the bridge across it at Park Street in the City of El Paso, while said bridge was undergoing repairs."

Mr. Brockmoller:

If it please the Court, we would like to object to that on the basis it is irrelevant and immaterial to any issues in this case, and anything to do with the Mendoza case is not involved here in this suit.

The Court:

Overruled.

Mr. Brockmoller:

Note our exception.

Mr. Scott:

"The Defendant admits Request Number Seventeen."

Mr. Edwards:

"18. On August 3, 1943, the City of El Paso filed its Plea in Abatement and Answer in said cause numbered 53430 on the docket of the Forty-First District Court of El Paso County, Texas, acting by and through its duly appointed, qualified, authorized, and acting City Attorney, E. F. Cameron, and by its duly appointed, qualified, authorized and acting Assistant City Attorney, R. F. Momsen."

Mr. Brockmoller:

May it please the Court, could we have the same objection? We would like to have a continuing objection to anything relating to the Mendoza suit.

The Court:

Yes. You will have the point saved. Overruled.

Mr. Scott:

"The Defendant admits Request Number Eighteen."

Mr. Edwards:

"19. On September 13, 1944, the City of El Paso filed its Plea in Abatement and Amended Answer in said cause numbered 53430 on the docket of the Forty-First District Court of El Paso County, Texas, acting in such matter by and through its duly appointed, qualified, authorized and acting City Attorney, Travis White, and by its duly appointed, qualified, authorized and acting Assistant City Attorney, R. F. Momsen."

Mr. Scott:

"The Defendant admits Request Number nineteen."

Mr. Edwards:

"20. E. F. Cameron was the duly appointed, qualified, authorized and acting City Attorney of the City of El Paso from June 22, 1142, to September 15, 1943."

Mr. Scott:

"The Defendant admits Request Number Twenty."

Mr. Edwards:

"R. F. Momsen was a duly appointed, qualified, authorized and acting Assistant City Attorney of the City of El Paso from April 17, 1941, to February, 1948."

Mr. Scott:

"The Defendant admits Request Number Twenty-One."

Mr. Edwards:

"22. Travis White is now the duly appointed, qualified, authorized and acting City Attorney of the City of El Paso, and has been such since September 16, 1943."

Mr. Scott:

"The Defendant admits Request Number Twenty-Two."

Mr. Edwards:

This will be answered in No. 9. "23. As a part of the proceedings of the City Council at a regular meeting thereof commencing Thursday, August 31, 1939, at which Mayor Anderson was present and presiding, and at which meeting Aldermen Travis, Walthall and Morgan were present from the beginning, and at

which Alderman Duke later appeared, it was brought to the attention of the Mayor and City Council, by Roland Harwell, that $56,000.00 had been set aside by the Public Works Administration of the United States to fence the Franklin Irrigation Canal within the City Limits of the City of El Paso, but was contingent upon the acquirement by the United States Government of right-of-way of the canal across streets, alleys and intersections of the City, and an ordinance subsequently passed and approved September 5, 1939, conveying to the United States of America all the right, title and interest of the City of El Paso in and to the right-of-way occupied by the Franklin Canal over, along and across all streets, alleys and other public lands of the City of El Paso and subsequently recorded in Minute Book Z-2, Pages 354 and 355 of the proceedings of the City Council was read by the City Clerk and motion was duly made, seconded and carried by unanimous votes of Aldermen Travis, Walthall, Duke and Morgan that said ordinance be adopted, and it was passed on such vote."

Mr. Scott:

"Defendant admits Request No. 23 excepting that it denies the validity of the ordinance referred to therein and the power of the City Council to pass such ordinance."

Mr. Edwards:

"24. As a part of the proceedings of the City Council at a regular meeting thereof on November 9, 1939, at which Mayor Anderson was present and presiding, and at which meeting Aldermen Travis, Walthall, Duke and Morgan were present, it was made known to the Mayor and City Council that the

Washington officials of the Bureau of Reclamation had held up the funds for the fencing of the Franklin Canal because of the omission from the ordinance passed and approved September 5, 1939, of the following clause: 'contingent, however, upon appropriation being made therefor by Congress' following the provision in the ordinance obligating the Government to maintain certain crossings, and because of the omission from the quitclaim deed, executed in pursuance of the ordinance, of the same clause, whereupon the City Clerk read an ordinance subsquently duly passed and approved on November 9, 1139, and recorded in Minute Book Z-2, Pages 448 and 449, inclusive, of the proceedings of the City Council, amending the ordinance passed and approved September 5, 1939, to meet the Government's objections, and motion was duly made, seconded and carried by unanimous vote that said amendatory ordinance be adopted, and it was passed on such vote."

Mr. Scott:
"Defendant admits Request numbered 24, but denies the validity of the ordinances referred to therein and the power of the Council to pass the same."

Mr. Edwards:
"25. Prior to January 22, 1953, the City of El Paso through its mayor, Fred Hervey, declared its intention to take from the Rio Grande or from the Franklin Canal an amount of water equivalent to the sewage effluent discharged by it into the river, without making any payment for such water or use of the Rio Grande Project facilities."

Mr. Scott:
"Defendant admits Request numbered 25."

Mr. Edwards:

"28. Following the execution of the written contract dated August 10, 1949, between the City of El Paso and El Paso County Water Improvement District No. 1, the City of El Paso did in fact use Project works mentioned therein for the purposes of that contract as set forth therein, but only at such times as there were storm, flood, return flow and unavoidable waste waters in excess of the requirements of the District and the Hudspeth County Conservation & Reclamation District No. 1 as determined by the Project Manager, and paid to the District the amounts indicated in said contract before the same became delinquent for each year until after Fred Hervey had been elected Mayor of the City of El Paso and qualified as such in 1951."

Mr. Scott:

"Defendant admits portions of Request numbered 28 in that following the execution of the written contract dated August 10, 1949, the City did take waters from the Franklin Canl and the Rio Grande and paid to the District the amounts indicated in said contract until the year 1951, in which year Fred Hervey was elected Mayor of the City of El Paso and qualified as such, but denies the balance of said Request."

Mr. Edwards:

"29. Following the execution of the contract in writing dated December 1, 1949, between the City of El Paso, the El Paso County Water Improvement District No. 1, the United States of America, Department of the Interior, Hudspeth County Conservation & Reclamation District No. 1, Ft. Quitman Land Company and Sam H. Cook, et al., as individuals provid-

ng that the protest to the State Board of Water Engineers made by the parties other than the City of El Paso relative to the City's application to the Board for a permit to use water from the Rio Grande should be withdrawn on condition that the rights of the City of El Paso be subject to the terms of the contract of August 10 1949, to which reference is above made, such protest was in fact withdrawn and thereafter the Texas Board of Water Engineers, on or about May 8, 1950, made an order purporting to give to the City of El Paso a permit to take up to 27,000 acre feet per year of the unappropriated or unused storm, flood and return waters of the Rio Grande on the terms and conditions shown in said written order bearing date the 10th day of May, A. D. 1950."

Mr. Scott:

"Defendant admits Request numbered 29, excepting that it denies that the permit by the Texas Board of Water Engineers was granted because of the withdrawal of the protests, and denies that the order purported to giv to the City of El Paso a permit, and says that the Texas Board of Water Engineers did grant to the City a permit to take up to 27,000 acre feet per year of the unappropriated waters of the Rio Grande subject to the terms and conditions shown in said order."

Mr. Edwards:

"30. Following the written agreement dated the 22nd day of June, 1950, between the City of El Paso by D. L. P. Duke, Mayor, on the one part, and El Paso County Water Improvement District No. 1, on the other part, providing that the Permit to Appropriate Public Waters of the State of Texas No.

1535, granted to the City of El Paso by the Board of Water Engineers of the State of Texas on May 8, 1950, is subject to the contract of August 10, 1949, between the City of El Paso and El Paso County Water Improvement District No. 1, as clarified and interpreted by letters dated September 23, 1949, from the Secretary of the Interior to the Mayor of El Paso and the General Manager of said Water Improvement District, recognizing that said contract, as so clarified and interpreted, was still in effect and that said agreement of June 22, 1950, should inure to the benefit of all parties who signed the contract of December 1, 1949, no appeal to the Courts was taken by any protestant from said order of the Board of Water Engineers."

Mr. Scott:

"Defendant admits Request numbered 30, particularly that no appeal to the Courts was taken by any of the protestants from the order of the Board of Water Engineers, but denies the validity of the agreements stated therein and the authority of the Secretary of the Interior to impose any limitations by means of his letter of clarification, and denies the validity of the contract."

Mr. Edwards:

"31. The City of El Paso never asserted, prior to the time when Fred Hervey was elected and qualified as Mayor of said City in 1951, that any of the contracts in writing above mentioned, dated February 18, 1941, December 1, 1944, August 10, 1949, and June 22, 1950, respectively, were for any reason void, voidable, illegal or unauthorized."

Mr. Scott:
"Defendant admits Request numbered 31."

Mr. Edwards:
"32. At no time, prior to the election of Fred Hervey as Mayor of the City of El Paso in 1951, did the City of El Paso ever claim that the ordinance of November 9, 1939, recorded in Book Z-2, pages 448 and 449 of the proceedings of the El Paso City Council, or the quitclaim deed from the City of El Paso to the United States of America dated November 9, 1939, recorded in Book 660, page 399 of the Deed Records of El Paso County, Texas, was for any reason void, voidable, illegal or unauthorized."

Mr. Scott:
That request is also answered in No. 15, and "Defendant admits Request numbered 32."

Mr. Edwards:
"33. For the purpose of compelling litigation for its collection, the City of El Paso deliberately and intentionally withheld from the payment made to the El Paso County Water Improvement District No. 1 on February 4, 1952, the sum of $2,371.70 claimed by the District to be delinquent on January 31, 1952."

Mr. Scott:
"Defendant admits a portion of Request numbered 33, in that it deliberately and intentionally refused to make payment to the El Paso County Water Improvement District No. 1 the sum of $2,371.70 claimed by the District, but denies that it was for the purpose of compelling litigation."

Mr. Edwards:

"34. The sum of $2,371.70 withheld by the City of El Paso from its payment of February 4, 1952, to the El Paso County Water Improvement District No. 1, was made up of items for the water year ending in 1951, being the same as items which had theretofore been recognized and paid by the City of El Paso in previous years as proper charges under its contracts with the United States of America and the El Paso County Water Improvement District and the Elephant Butte Irrigation District hereinabove mentioned." You will find that answered in their answer No. 44.

Mr. Scott:

"Defendant admits so much of Request numbered 34 as follows: Defendant did not pay the sum of $2,371.70 to the El Paso County Water Improvement District No. 1, and admits that the aggregate of the items represented by the said sum of $2.371.70 was made up of items for the water year ending 1951 which had theretofore been paid by the City of El Paso in previous years. Defendant denies the remainder of said Request."

Mr. Edwards:

"35. Prior to January 22, 1953, the City of El Paso demanded of the El Paso County Water Improvement District No. 1 and of the United States of America that it or they, at its or their cost and expense, replace all existing bridges forming parts of city streets across the Franklin Canal, and to install new additional bridges of the width, kind and character desired by the City at points designated by the City Council." You will find that one answered in their answer No. 17.

Mr. Scott:
"Defendant admits Request numbered 35."

Mr. Edwards:
"36. The cost of construction of any one of the new bridges which the City has demanded be constructed by plaintiffs exceeds $3,000.00."

Mr. Scott:
"Defendant admits Request numbered 36."

Mr. Edwards:
"37. The City of El Paso now claims that all of the contracts and stipulations in writing which it signed under dates of February 18, 1941, December 1, 1944, August 10, 1949, December 1, 1949, and June 22, 1950, respectively, as hereinabove mentioned, are unauthorized, void and not binding on it."

Mr. Scott:
"Defendant admits Request numbered 37."

Mr. Edwards:
"38. The City of El Paso now claims that the city ordinance of September 5, 1939, recorded in Book Z-2, Pages 354 and 355 of the proceedings of the City Council, conveying to the United States of America all the right, title and interest of the City of El Paso in and to the right-of-way occupied by the Franklin Canal over, along and across all streets, alleys and other public lands of the City of El Paso, is unauthorized, void and of no effect."

Mr. Scott:
"Defendant admits Request numbered 38."

Mr. Edwards:

"39. The City of El Paso now claims that the city ordinance of November 9, 1939, recorded in Minute Book Z-2, pages 448 and 449 of the proceedings of States and its officers" in all respects the same as the City Council, amending the above ordinance of September 5, 1939, recorded in Minute Book Z-2, pages 354 and 355, is unauthorized, void and of no effect."

Mr. Scott:

"Defendant admits Request numbered 39."

Mr. Edwards:

"40. The City of El Paso now claims that the quitclaim deed dated November 9, 1939, from it to the United States of America, conveying to the United States all right, title and interest in land occupied by the Franklin Canal, recorded in Book 660, page 399 of the Deed Records of El Paso County, Texas, is unauthorized, void and of no effect."

Mr. Scott:

"Defendant admits Request numbered 40."

Mr. Edwards:

"41. The City of El Paso now claims that it has the legal right to take from the Franklin Canal and from the Rio Grande itself waters of the Rio Grande Federal Reclamation Project, unlimited by any restrictions imposed on it by the terms of any of the above mentioned contracts of February 18, 1941, December 1, 1944, August 10, 1949, December 1, 1949

and June 22, 1950, to which it was a party, and without paying to the plaintiff District or to the United States of America the charges set forth in any of said written agreements, or being in any other way liable to either of them for the value of said water or the use of Project facilities in its transportation."

Mr. Scott:

"Defendant admits a portion of Request numbered 41, in that it claims to have the right to take from the Franklin Canal and from the Rio Grande water unappropriated by any restrictions imposed on it by any of the contracts mentioned therein and without paying any of the charges set forth therein, but denies that the waters are those of 'Rio Grande Federal Reclamation Project,' and denies that it is obligated to pay for the use of 'Project facilities'"

Mr. Edwards:

"42. The City of El Paso now claims that neither the United States nor the plaintiff District has any right to use the Franklin Canal except by sufferance of the City of El Paso."

Mr. Scott:

"Defendant admits Request numbered 42."

Mr. Edwards:

"43. The City of El Paso has notified the plaintiff District and the United States that it will pump into the bed of the Rio Grande at a point about 16½ miles upstream from the headgate of the Franklin Canal and above the point of delivery of water by the United States to Mexico under the Treaty of May 21, 1906, such water as is obtainable from wells on

irrigable land owned by the City within the Rio Grande Project, and has withdrawn and will continue to withdraw, at its water treatment plant within the City Limits of El Paso, an amount of water not limited by the provisions of any of the above mentioned written contracts."

Mr. Scott:

"Defendant admits Request numbered 43, except that portion 'within the Rio Grande Project,' which it denies."

Mr. Edwards:

"45. The water supply of the City of El Paso is not restricted to water from the Rio Grande."

Mr. Scott:

"Defendant almits Request numbered 45."

Mr. Edwards:

'48. The City of El Paso, within the years 1952 and 1953, has pumped, and unless restrained intends to continue pumping, water from the Rio Grande or from the Franklin Canal into its wells on property not abutting upon the Rio Grande, and not riparian with reference thereto."

Mr. Scott:

"Defendant admits Request numbered 48."

Mr. Edwards:

"49. The City of El Paso through its Mayor, Fred Hervey, has publicly questioned the ownership of the Franklin Canal by the United States of America, and the City of El Paso has, since his election as

Mayor, taken water which it had been told it had no right to take from the Rio Grande and the Franklin Canal, and it has refused and continues to refuse to pay any charges for the use of the Franklin Canal." That's answered in 25 and 45.

Mr. Scott:

"The Defendant admits Request numbered 49, excepting that portion 'which it had been told it had no right to take.'" That's under their Answer No. 25. Then under Answer No. 45 they say "Defendant admits that portion of Request numbered 49 not heretofore admitted", and then it refers to Paragraph 25 back here.

Mr. Edwards:

"50. Plaintiff United States of America in connection with its operation of the Rio Grande Project has heretofore constructed the Canutillo Lateral Wasteway; the Vinton River Lateral; and the Vinton River Drain. The United States purchased the Franklin Canal in 1912 from the Franklin Irrigation Company. All of these facilities have been continuously operated by the United States since their acquisition for the benefit of the Rio Grande Federal Irrigation Project and are now being so operated. But the City of El Paso has drilled at least six water wells at its Canutillo Reservoir Site and is discharging the flow of these wells into the Canutillo Lateral Wasteway, the Vinton River Lateral and the Vinton River Drain, from whence the flow is into the Rio Grande and on reaching the vicinity of El Paso these flows are again diverted from the river into the Franklin Canal and into the City's water treatment plant for its use in its municipal water supply. but the City of El

Paso has refused to enter into a proper licensing agreement with the United States authorizing such uses by the City."

Mr. Scott:

"Defendant admits that portion of Request numbered 50 wherein it is stated that the City of El Paso has drilled six water wells at its Canutillo Reservoir Site and is discharging the flow of these wells into the Canutillo Lateral Wasteway, the Vinton River Lateral and the Vinton River Drain, and that the water reaches the Rio Grande and that as it reached the vicinity of El Paso the flows from these wells are diverted from the river in part into the Franklin Canal and part directly from the river into the City water treatment plant for its use in its municipal water supply. Defendant denies that portion of Request numbered 50 wherein it is stateu 'The United States purchased the Franklin Canal in 1912 from the Franklin Irrigation Company,' in that the word 'purchased' carries with it the connotation of legal ownership, which the City denies."

Mr. Edwards:

"51. Following the Convention of February 1, 1933, between the United States and Mexico (48 Stat. 1621) for the rectification of the Rio Grande by decreasing its length from the City of El Paso to Box Canyon at Ft. Quitman from 155 miles to 88 miles and confining this channel between two parallel levees, wherein it was provided in Article VII thereof that 'Lands within the rectified channel, as well as those which, upon segregation, pass from the territory of one country to that of the other, shall be acquired in full ownership by the Government in whose territory said lands

are at the present time; and the lands passing as provided in Article V hereof, from one country to the other, shall pass to each Government respectively in absolute sovereignty and ownership, and without encumbrance of any kind, and without private national titles,' and pursuant thereto, the United States of America did, by purchase under the various deeds dated and recorded in the Deed Records of El Paso County, Texas, and in the Deed Records of Hudspeth County, Texas, as shown in Exhibit A attached hereto, and by condemnation proceedings in the United States District Court for the Western District of Texas, El Paso Division, under judgments on declaration of taking from the various owners on dates also shown on Exhibit A attached hereto, and by cession from Mexico of lands within bancos formerly lying within that Republic, in addition to the cession by the State of Texas by Act of the Texas Legislature September 22, 1934, 43rd Legislature, 3rd Called Session of all its right, title and interest in and to the bed and banks of the Rio Grande in El Paso County, and in Hudspeth County, necessary or expedient in the rectification of the channel of the Rio Grande, acquire the ownership of all lands on the United States side of the rectified river occupied by the levee constructed by the United States and extending to the middle of the rectified channel of the Rio Grande from a point in the old river bed south of Cordova Island at El Paso to the terminus of the Project in Hudspeth County, Texas."

Mr. Scott:

"Defendant admits all of Request numbered 51, excepting that portion wherein it is stated that the State of Texas ceded all of its right, title and interest in

and to the bed and banks of the Rio Grande in El Paso County and in Hudspeth County necessary or expedient in the rectification of the channel of the Rio Grande, because said Act of the Legislature qualified said cession upon the condition that the State of Texas should retain concurrent jurisdiction with the United States of America over such lands so ceded remaining in the United States insofar as civil and criminal processes were concerned, and it provided further 'It is provided further that nothing in this Act contained shall be construed to be a cession or relinquishment of any rights which the State of Texas or citizens or property owners therein may hold or possess in the waters of the Rio Grande, and in the use thereof, and in the access thereto;' and further because the State of Texas did by an act of the Legislature, Acts 1925, 39th Legislature, Chapter 155, page 366, Section 1, previously relinquish, quitclaim and grant unto the City of El Paso all of the beds and channels and also al of the abandoned beds and channels of the Rio Grande that were then or thereafter within the present or future corporate limits of the City of El Paso."

Mr. Edwards:

"52. Prior to the year 1941 the United States of America became the owner of lands in El Paso County, Texas, in which there is included the American Canal from the American Dam above the City of El Paso to the headgate of the Franklin Canal within the City Limits of the City of El Paso."

Mr. Scott:

"Defendant admits Request numbered 52."

Mr. Edwards:

"53. Prior to June 24, 1910, a dispute arose between the United States and Mexico as to the international title of a large tract of land bordering the Rio Grande at El Paso, Texas, and Ciudad Juarez, Chihuahua, Mexico, commonly known as the Chamizal tract, bounded westerly and southerly by the middle of the present channel of the Rio Grande, easterly by the middle of the abandoned channel of 1901, and northerly by the middle of the channel of the river as surveyed by Emory and Salazar in 1852, which is substantially north of the present river."

Mr. Scott:

"Defendant admits all of Request numberel 53, excepting that it denies that the boundaries of the Chamizal Tract are as set out in said Request."

Mr. Edwards:

"55. By the Convention of June 24, 1910, between the United States of America and Mexico, the difference between the two governments as to the international title of the Chamizal tract was referred to a specially enlarged International Boundary Commission for decision of the Commission, whether rendered unanimously or by majority vote of the Commissioners should be final and conclusive upon both Governments as more fully set forth in detail in 37 United States Statutes at Large: Page 2481, et seq., but the difference between the two Governments as to his title has never been settled."

Mr. Scott:

"Defendant admits Request numbered 55."

Mr. Edwards:

"56. The United States of America, prior to the year 1942, acquired by purchase or condemnation, together with use of rights of way in patents reserved to the United States from lands taken up after August 30, 1890, pursuant to Act of August 30, 1890, c. 837, (26 Stat. 371, 391), and paragraph Seventh of the New Mexico Enabling Act of June 20, 1910, (36 Stat. 557, c. 310), recognized by Article 21, Section 7 of the New Mexico Constitution, the title to lands in New Mexico which include the bed and banks of the Rio Grande from Percha Diversion Dam, approximately two miles south of Caballo Dam, all the way to the American Dam built by the American Section of the International Boundary Commission across the channel of the Rio Grande wholly on American territory just north of the City Limits of the City of El Paso, Texas, with the exception of a stretch approximately eight miles in length through Selden Canyon in Dona Ana County, New Mexico, and as to this exception the United States of America, on or about December 1, 1947, secured a perpetual easement thereon for the purposes of constructing, operating and maintaining river channel deepening or improvements, levee and levee road construction or reconstruction, floodway clearing and leveling, making channel cuts, installing rock jetties and revetments, arroyo diversions and all appurtenant works, and reconstruction of irrigation and drainage features as set forth in detail in that certain easement in writing dated November 29, 1947, from Gloria Miller Hayner Shelley and William Franklin Hayner, joint executors of the Last Will and Testament of Franklin Mitchell Hayner, deceased, to the United States of America, dated November 29, 1947, acknowledged by the grantors De-

cember 1, 1947, and duly recorded in Book 23, Page 226 of the Miscellaneous Records of Dona Ana County, New Mexico."

Mr. Scott:

"Defendant admits so much of Request numbered 56 insofar as it refers to lands in New Mexico, but denies the same as to lands within the State of Texas."

Mr. Edwards:

"60. In accordance with the Convention of February 1, 1933, between the United States and Mexico (48 Stat. 1621) the channel of the Rio Grande was in fact rectified by the International Boundary Commission of the two Governments by decreasing the length of the channel between the City of El Paso and Box Canyon (Ft. Quitman, Texas) from approximately 155 miles to approximately 88 miles by constructing artificial channels across bends in the natural river bed and confining the rectified channel between two parallel levees, one upon the American side of the river and one upon the Mexican side, such work being completed in the year 1938."

Mr. Scott:

"Defendant admits Request numbered 60."

Mr. Edwards:

"61. The City of El Paso made all payments called for by all contracts between the City of El Paso on the one part, and the United States of America, and El Paso County Water Improvement District No. 1, and Elephant Butte Irrigation District, or either of the latter, on the other part, for all years prior to 1951 before the same became delinquent."

Mr. Scott:

"Defendant admits Request numbered 61, but does not admit the validity of the contracts mentioned therein."

Mr. Edwards:

"62. Acting pursuant to the contracts of February 18, 1941, and December 1, 1944, between the City of El Paso and the United States of America and El Paso County Water Improvement District No. 1 and Elephant Butte Irrigation District, the City of El Paso did in fact purchase, and now owns, approximately 1406 acres of first-class water right land within the limits of El Paso County Water Improvement District No. 1, but outside of the corporate limits of the City of El Paso, and has caused Rio Grande Project water which would otherwise have been delivered to said lands for irrigation thereof, to be diverted to and used in the City's water treatment plant for municipal purposes."

Mr. Scott:

"Defendant admits all of Request numbered 62, excepting that portion which reads as follows: 'and has caused Rio Grande Project water which would otherwise have been delivered to said lands for irrigation thereof, to be diverted to and used in the City's water treatment plant for municipal purposes.'"

Mr. Edwards:

"63. During the year 1953 the City of El Paso withdrew water from the Franklin Canal or the Rio Grande in excess of the amount of water which the City of El Paso was entitled to take by reason of its ownership of first-class water right lands within the

Rio Grande Federal Reclamation Project, and persisted in such excess withdrawals after it had been notified of its overdraft by the Rio Grande Project Superintendent."

Mr. Scott:

"Defendant admits Request numbered 63, except that it denies that portion quoted as follows: 'within the Rio Grande Federal Reclamation Project, and persisted in such excess withdrawals after it had been notified of its overdraft by the Rio Grande Project Superintendent.'"

Mr. Edwards:

"64. The City of El Paso, in the years 1951, 1952 and 1953, has in fact taken from the Franklin Canal or from the Rio Grande itself, Project return flow water and has refused to pay for such water the amount of money uniformly charged by said District to other water right landowners for return flow water, and has refused to pay any sum whatever for such water, and the City is continuing such practice."

Mr. Scott:

"Defendant admits that portion of Request numbered 64, in that it has in fact taken from the Franklin Canal or from the Rio Grande water, and has refused to pay for such water, but denies that it is necessarily so-called 'Project return flow water' and denies that the District had any right to make any charge for any water so taken. Defendant admits it has refused to pay any sum for the waters taken, and that Defendant is continuing such practice."

Mr. Edwards:

"65. The written deed from the City of El Paso as grantor to the United States of America as grantee, dated November 9, 1939, recorded in Book 660, page 399 of the Deed Records of El Paso County, Texas, was in fact signed and acknowledged by J. E. Anderson in his capacity as Mayor of the City of El Paso, and was in fact attested by W. R. Collins in his capacity as City Clerk of the City of El Paso."

Mr. Scott:

"Defendant admits Request numbered 65."

Mr. Edwards:

We now turn to Plaintiffs' Request for Admission of Genuineness of Documents. (Mr. Edwards then starts reading same with Mr. Scott again reading from the answers filed by the Defendant.) "Pursuant to Rule No. 36 of the Federal Rules of Civil Procedure plaintiffs El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs, W. L. Summers, and the United States of America request defendant defendant City of El Paso, within fifteen days after service of this request, to admit, for the purpose of this action only, that each of the following documents, exhibited with this request, is genuine:

1. Contract between the United States of America, acting through E. C. Finney, First Assistant Secretary of the Interior, on the one part, and El Paso County Water Improvement District No. 1, acting through its president, T. D. Porcher, attested by Idus T. Gillett, its secretary, on the other part, dated the 12th day of October, 1922."

Mr. Scott:

(Reading "Defendant admits the genuiness of the contract described in Paragraph numbered 1."

Mr. Edwards:

"2. Contract between the United States of America, acting through Oscar L. Chapman, Assistant Secretary of the Interior, on the one part, and El Paso County Water Improvement District No. 1, acting through T. D. Porcher, its president, attested by Idus T. Gillett, its secretary, on the other part, dated the 10th day of November, 1937."

Mr. Scott:

"Defendant admits the genuiness of the contract described in Paragraph numbered 2."

Mr. Edwards:

"3. Contract between the United States of America, acting through L. R. Fiock, Superintendent, Bureau of Reclamation, the City of El Paso, acting through J. E. Anderson, its Mayor, attested by W. R. Collins, its City Clerk, and El Paso County Water Improvement District No. 1, acting through Idus T. Gillett, its president, attested by its secretary, K. B. Ivey, and dated the 18th day of February, 1941."

Mr. Scott:

"Defendant admits the contract set out in paragraph numbered 3 of said Request, but denies the validity thereof."

Mr. Edwards:

"4. Contract between the United States of America, acting through L. R. Fiock, the City of El Paso,

Texas, acting through J. E. Anderson, its Mayor, attested by W. R. Collins, its City Clerk, Elephant Butte Irrigation District, acting through W. T. Scoggin, its president, attested by its secretary, F. S. Bamert, El Paso County Water Improvement District No. 1, acting through K. B. Ivey, its president, attested by its secretary, P. F. Brinkmann, dated the 1st day of December, 1944, together with the attached and accompanying certified copies of the 'Resolution of the City Council of the City of El Paso, Texas, duly adopted at regular meeting of the City Council on December 7, 1944' and the 'Resolution of the Board of Directors of the Elephant Butte Irrigation District of New Mexico, adopted at the Regular Meeting of the Board on January 2, 1945' and the extract from the minutes of a meeting of the Board of Directors of El Paso County Water Improvement District No. 1, held on January 5, 1945."

Mr. Scott:

"Defendant admits the contract in paragraph numbered 4 and the resolutions mentioned therein, but denies the validity of the contract."

The Court:

I will interrupt there.

(At this point a recess was had from 10:50 o'clock A.M. until 11:00 o'clock A.M. the same day, at which time proceedings were resumed as follows):

Mr. Edwards:

We had gotten down to Number Five. (Continues reading): "5. Stipulation in writing before the Board of Water Engineers, State of Texas, between the City

of El Paso, Applicant, on the one part, and El Paso County Water Improvement District No. 1, United States of America; and the Department of the Interior of the United States of America, Rio Grande Project, Hudspeth County Conservation and Reclamation District No. One, Fort Quitman Land Company and others, Protestants, dated the 1st day of December, 1949."

Mr. Scott:

"Defendant admits the execution of the stipulation referred to in paragraph numbered 5 of said Request, but says that the same did not become a part of the permit granted by the State Board of Water Engineers in said cause."

Mr. Edwards:

"6. Written agreement between the City of El Paso, acting through D. L. P. Duke, its Mayor, attested by W. R. Collins, its City Clerk, and El Paso County Water Improvement District No. 1, acting through L. D. McComas, its president, attested by Francis J. Warnock, its secretary, dated the 22nd day of June, 1950."

Mr. Scott:

"Defendant admits the execution of the written agreement referred to in paragraph numbered 6, but denies the validity thereof."

Mr. Edwards:

There was some more of that Number Six (Reading) "Copies of all documents mentioned as items 1 to 6 above are attached hereto, and the originals thereof, in addition to being exhibited to you here-

with, will again be produced for inspection, upon reasonable notice, at the office of Eugene T. Edwards, 505 First National Building, El Paso, Texas.

B.

Said plaintiffs further request defendant, within fifteen days after service of this request, to admit, for the purpose of this action only, the truth of the following facts relating to various documents above enumerated:

(a) The copy of the letter dated El Paso, Texas, March 7, 1941, to Mr. W. E. Robertson, Chairman, Water Development Commission, El Paso, Texas, from L. R. Fiock, Superintendent, attached to the contract of February 18, 1941, is a true copy of the original of said letter which was received in due course by Mr. Robertson."

Mr Scott:

"Defendant admits the truth of the facts related in Paragraph (a)."

Mr. Edwards:

Skip (b) and (c). "(d) The copy of the contract of August 10, 1949, between the City of El Paso and El Paso County Water Improvement District No. 1, attached to the written stipulation of December 1, 1949, between the City of El Paso, El Paso County Water Improvement District No. 1, United States of America, and the Department of the Interior of the United States of America, Rio Grande Project, and Hudspeth County Conservation and Reclamation District No. One, together with the accompanying copies of the

approval of the Secretary of the Interior, J. A. Krug, dated September 23, 1949, and the Resolution adopted by the City Council of the City of El Paso under date of August 9, 1949, authorizing the execution of said contract of August 10, 1949, by the Mayor of said City, the Resolution adopted by the Board of Directors of El Paso County Water Improvement District No. One on August 5, 1949, authorizing the execution of said contract on behalf of said Water District, the letter addressed by the Honorable J. A. Krug, Secretary of the Interior, to Mr. Roland Harwell, General Manager, El Paso County Water Improvement District No. One, of date September 23, 1949, defining the conditions upon which the Secretary of the Interior approved said contract, the letter addressed under said date of September 23, 1949, by the Secretary of the Interior to the Honorable D. L. P. Duke, Mayor of the City of El Paso, defining the conditions subject to which the Secretary of the Interior approved said contract, the Resolution adopted by the Board of Directors of El Paso County Water Improvement District No. One on September 30, 1949, accepting the conditions laid down by the Secretary of the Interior, the Resolution adopted by the City Council of the City of El Paso under date of September 28, 1949, accepting the conditions laid down by the Secretary of the Interior, and letter addressed by H. E. Robbins, Regional Director, Bureau of Reclamation, under date of October 5, 1949, to Hon. Dan Duke, Mayor, City of El Paso, placing in effect as of September 23, 1949, the contract of August 10, 1949, all as disclosed by Exhibits A to F, both inclusive, attached to the original of said stipulation of December 1, 1949, are true copies of the originals of said letters and Resolutions. The several letters

were delivered in due course to the respective addressees, and certified copies of the several Resolutions were duly delivered as required by the terms of each."

Mr. Scott:

"Defendant admits the truth of the statements contained in Paragraph (d)."

Mr. Edwards:

"(e) The signed copy of the letter dated El Paso, Texas, January 31, 1945, from L. R. Fiock, Superintendent; addressed to Hon. J. E. Anderson, Mayor, City of El Paso, El Paso, Texas, Mr. Roland Harwell, Manager, El Paso County Water Improvement District No. 1, El Paso, Texas, and Mr. John Gregg, Treasurer-Manager, Elephant Butte Irrigation District, Las Cruces, New Mexico, attached to the original of the contract above mentioned dated December 1, 1944, is a true copy of the originals of said letter, one of which was delivered in due course with an original number of said contract to the Honorable J. E. Anderson as Mayor of the City of El Paso."

Mr. Scott:

"Defendant admits the truth of the statements contained in Paragraph (e)."

MR. W. F. RESCH, a witness called by the Plaintiffs, having first been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Edwards:

Q. State your full name, please.

A. W. F. Resch.

Q. What is your business, Mr. Resch, or occupation?

A. I am Project Manager of the Rio Grande Project, Bureau of Reclamation.

Q. How long have you been such?

A. Since July 1st, 1952.

Q. Were you connected with it pri[illegible] to that date?

A. Yes, I have been with the Rio Grande Project since 1952.

Q. Were you Assistant Project Manager prior to becoming the Manager?

A. I was Assistant Project Superintendent and Assistant Project Manager from 1947 to July 1st, 1952.

Q. Mr. Resch, what are your duties and over what do you have supervision and capacity which you have stated?

A. The Rio Grande Project, which includes the Elephant Butte Irrigation District of New Mexico, which district has a water rights area of about 91,000 acres, and the El Paso County Water Improvement District Number One of Texas, which has a water rights area of 68,900 acres, the Elephant Butte Dam, the Caballo Dam, the canals, laterals, drains, diversion dams and the Rio Grande Project Power System.

Q. Do you know approximately how many miles of canals and drains there are within the Project?

A. Yes, sir. There are approximately 608 miles of canals and laterals.

(At this point an instrument was marked for identification as Plaintiffs' Exhibit 35, and handed to opposing counsel for examination.)

Q. I will ask you to examine a document, which has been marked for identification as Plaintiffs' Exhibit Number 35, and ask you to state what that is, please.

A. (After examining.) This is a map of the El Paso County Water Improvement District Number One, the Texas unit of the Rio Grande Project.

Q. Was that prepared from the records in your office and prepared by your office?

A. Yes, sir.

Q. You are responsible for its correctness?

A. Yes, sir.

Q. Mr. Resch, perhaps you can be of some assistance to the Court here if you refer to this map or plat, which has already been offered in evidence as Exhibit 1. You have described your jurisdiction as extending from the northern limits, I believe, Elephant Butte Reservoir of the Project to the southeastern limits. Will you point out, please, on this map here the location of the northern limits of the Project?

A. The Rio Grande Project, including the power system, extends from El Paso to Albuquerque, New Mexico, a distance of approximately 275 miles. The irrigation features of the project extend from Elephant Butte Reservoir in New Mexico down through Socorro, Sierra, and Dona Ana Counties in New Mexico, and El Paso County, Texas, to the El Paso County-Hudspeth County line, which is right down in this area here. (Indicating.)

Q. Now immediately below the southern limits of the Rio Grande Federal Irrigation Project what irrigation project is there?

A. The Hudspeth Conservation and Reclamation District, incorporated under Texas law and having a Warren Act contract with the Rio Grande Project of the United States, lies immediately south and east of the El Paso Valley, of the El Paso County Water Improvement District Number One.

Q. Now you say that irrigation system has a Warren Act contract with the United States?

A. Yes. That contract is dated December, 1924.

Q. And was it subsequently modified by an amendment in 1951, as you recall?

A. Yes, sir. The irrigation facilities of the project include, of course, the Elephant Butte Dam, which created the Elephant Butte Reservoir, that had a original capacity of 2,837,000 acre feet. Supplemental storage was provided by the Caballo Dam, which was constructed during 1936, 1937, and provided a secondary storage of 346,000 acre feet. The first diversion structure for the irrigated area is the Percha diversion dam, which is approximately one hundred miles upstream from El Paso. From that diversion is irrigated approximately 16,000 acres in the Rincon Valley unit of the project. Next we go down to the Leasburg diversion dam, which is at the head of the Mesilla Valley approximately 60 miles upstream from El Paso. Irrigation facilities for the Mesilla Valley are on both sides of the river after the Mesilla irrigation dam is reached, which is approximately 40 miles above the City of El Paso. The next diversion for project lands is made via the American Dam at El Paso for the upper portion of the El Paso Valley. Approximately 17 miles downstream the final diversion for the irrigated area at the Riverside Canal

is made. The Mesilla Valley, New Mexico, extends from Leasburg Dam to El Paso and includes approximately 80,000 acres of water right land. The El Paso Valley, below El Paso, to the El Paso-Hudspeth County line includes approximately 58,000 acres of water right land. Above El Paso the project canal system includes about 450 miles of canals and laterals and approximately 250 miles of drains. Below El Paso there are approximately 219 miles of canals and 190 miles of drains. The power system includes the power plant at Elephant Butte Dam with a capacity of 27,000 kilovolt amperage. From that plant radiate transmission lines going north to Albuquerque, south to Las Cruces, which is approximately 45 miles above El Paso, west to Deming and Silver City for approximately 80 miles, and east to Alamogordo and Hollywood, approximately a hundred miles. There are a total of about 500 miles of transmission lines radiating from the Elephant Butte Power Plant. These lines serve a total of about thirteen sub-stations. The cost of the project as of July 1st, this year, is about $26,645,000. Of that the water users are obligated to repay to the United States about $10,144,000. Of the latter amount the El Paso County Water Improvement District Number One is obligated to repay about $4,446,000. The repayment contracts are to be concluded September the 1st, 1968, at which time the irrigation facilities will have been repayed.

Mr. Edwards:

We will offer Plaintiffs' Exhibit 35 at this time.

The Court:

All right.

Plaintiffs' Exhibit Number 35 was thereupon received in evidence by the Court and a photostatic copy of this exhibit appears on the following page:

Note

Page 615 is the long chart on Card 11.

Mr. Edwards:

I have here a document, if it please the Court, that I would like to have the Reporter mark—

Mr. Grambling:

Now, Your Honor, we would like to object—

Mr. Edwards:

Let me offer it first.

The Court:

All right.

Mr. Edwards:

At this point we would like to offer in evidence a document marked "Plaintiffs' Exhibit No. 35a" (Reporter marks same), which consists of the duly authenticated copies of the two contracts of which Mr. Resch has just made mention between the United States of America and the Hudspeth County Conservation and Reclamation District No. 1; the first dated the 1st day of December, 1924, and the Amendatory Contract dated the 27th day of April, 1951. I will not take the time to read them in full just now but the effect of it is and the substance of them is that the United States will furnish facilities for delivering to the Hudspeth County Conservation and Reclamation District No. 1 whatever waste waters may be at the end of the Rio Grande Project in the drains and canal terminals at that point, and the discretion to be vested in the Government as to the amount, and providing that it shall in no way affect any of the rights of the Rio Grande Project.

Mr. Grambling:
We don't believe those contracts are material to any issues in this case. We don't see how they can have any bearing on any issues in this case.

Mr. Edwards:
They are material in that they become important to determine the amount of water available at El Paso.

The Court:
I will admit them in view of the contention that has arisen as to excess water and such as that, waste water. I will overrule the objection.

Mr. Grambling:
There is one other thing, I would like to call the Court's attention to the fact that they originally had the Hudspeth County Conservation and Reclamation District as being a party to this suit and they dropped them, and certainly these contracts affecting them couldn't be proper. They are the only ones that could be affected by these contracts.

The Court:
I will let the evidence in now. Of course, the whole perspective may get better at the end of the trial.

Mr. Grambling:
All right, sir.

Plaintiffs' Exhibit No. 35-a, having been received in evidence, reads in words and figures as follows:

United States of America
General Accounting Office

Pursuant to the provisions of sections 306 and 311 (e) of the Budget and Accounting Act, 1921, 42 Stat. 24, 25; 31 U. S. C. 46, 52 (e), and to 4 CFR 12.2 (a), I hereby certify that the annexed documents, are true copies of the official documents now on file in the General Accounting Office in the following case:

Hudspeth County Conservation and Reclamation District No. 1.

In Witness Whereof, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 23rd day of October in the year 1952 at Washington.

By direction of the Comptroller General of the United States.

(S.) E. C. BOHANNAN.
Chief Clerk.
General Accounting Office.

(Seal)

Department of the Interior. Bureau of Reclamation, Rio Grande Irrigation Project.

Contract Between the United States and Hudspeth County Conservation and Reclamation District No. 1, Providing for Rental of Water to the District

This Contract, made this first day of December 1924, in pursuance of the act of June 17, 1902 (32

Stat., 388), and acts amendatory thereof or supplementary thereto, particularly the Warren act of February 21, 1911 (36 Stat., 925), all herein styled the Reclamation Law, by and between The United States of America, herein styled the United States, acting in his behalf by the officer executing this contract, and the Hudspeth County Conservation and Reclamation District No. 1, herein styled the District, and irrigation district duly organized and existing under and by virtue of the laws of the State of Texas, witnesseth:

Explanatory Recitals.

2. Whereas, the District contains an irrigable area of 20,014 acres, located in Texas just below the Rio Grande Federal Irrigation Project; and

3. Whereas, the terminus of the Tornilio Main Canal of said project may be feasibly connected with a district canal to serve water to lands if the District; and

4. Whereas, the United States will have available for disposal at the terminus of said Tornillo Main Canal, certain water developed from the Rio Grande project, which water may be used for the irrigation of lands within the district;

5. Now Therefore, for and in consideration of the mutual and dependent stipulations herein set forth, it is hereby agreed as follows:

Rental of Water to District

6. The United States will deliver to the District at the terminus of the Tornillo Main canal, during the

irrigation season of 1925 and thereafter during each irrigation season as established on the Rio Grande project, such water from the project as may be available at said terminus without the use of storage from Elephant Butte reservoir. The Secretary of the Interior shall be at all times the sole judge of the availability of such water. The rental of water hereunder is secondary and inferior to the right to use water for any purpose on the lands of the Rio Grande Federal Irrigation Project. In consideration of such rental the District hereby relinquishes all right, title, interest, and claim to any and all waters of the Rio Grande, except as herein provided.

Payment by District for Water.

7. For the delivery of water during the irrigation season of 1925, the District shall pay the United States a charge of one dollar and twenty-five cents ($1.25) per acre-foot, on or before December 1, 1925. For the delivery of water thereafter, the District shall pay to the United States, on each December 1, such charge per acre-foot, to be fixed annually by the Secretary of the Interior, as shall return to the United States, six per centum on the construction cost per acre of such project works as affect the district water supply hereunder, plus a proper, proportionate share of the cost of operating and maintaining such project works. The decision of the Secretary of the Interior in fixing such charges shall be final and conclusive. All water available at the terminus of the Tornillo Main Canal, which can be put to beneficial use on district lands subject to irrigation at the time the water is available, shall be considered delivered to the district, and the district shall pay therefor:

without reference to whether all of such water is in fact actually taken and used on such lands. For the information of the district the Superintendent of the Rio Grande project will render to the district monthly statements showing the quantity of water in acre-feet delivered to the district during the preceding month. All water rental charges due and unpaid the United States from individual water users within the District, for the years 1921, 1922, and 1923, totaling $3,702.50, together with the penalties thereon, shall be paid by the District to the United States on December 31, 1925, and the District agrees to make during the year 1925, a special assessment against the lands on account of which said accruals are unpaid and to pay the amount so assessed on December 31, 1925.

Penalty for Delinquency in Payments.

8. To every sum of money required to be paid under this contract which shall remain unpaid after the same shall have become due, there shall be added at once a penalty of one per centum (1%) thereof, and a like penalty of one per centum (1%) on the first of each month thereafter so long as such default shall continue; and the District hereby agrees to pay such penalty. In the event the District fails to pay any amount provided for in this contract when due the United States may refuse to deliver water to the District until such payment is made. The provisions of this article are not exclusive and shall not in any manner hinder the United States from exercising any other remedy to enforce collection of moneys payable hereunder.

Default by Individual Landowners.

9. The District as a whole is obligated to pay to the United States the full amounts herein agreed upon, regardless of any individual default in the payment of any assessment levied by the District, and the District will make extra levies and collect extra assessments whenever necessary to make up for any such default or delinquency, so that in any event and regardless of such default or delinquency, the full amounts agreed to be paid shall be paid the United States by the District.

Measurement of Water.

10. The flow of water provided for in this contract during the irrigation season of 1925 and thereafter will be measured by the United States at the heading of the Ft. Hancock Main Canal where the United States will install and operate and maintain a measuring device, the cost of which as found by the United States, shall be borne by the District, and the measurements by the United States shall control for all purposes of this contract. This cost shall be additional to the charges payable under Article 7 hereof and shall be due and payable upon rendition of bills therefor.

Control of Water by District After Delivery.

11. The District, upon receiving the water delivered as herein provided, shall, at its own cost and expense, convey the same to the lands of the District and perform all acts necessary or required by law or custom, in order to maintain its control over such

water and in order to secure its beneficial applicati to the lands of the District. The District assumes full responsibility for the control and handling of said water and for any damage that may result therefrom after its delivery by the United States at the aforesaid point of delivery. All losses or diminution of such water by reason of seepage, evaporation or other causes after delivery by the United States at the aforesaid point of delivery shall be borne by the District.

Use of Water by District.

12. The water supplied under the terms of this contract shall be used solely for the purpose of distribution by the District for irrigation of lands in the District and such water shall be delivered by the District in accordance with and subject to the conditions and limitations of Section 1 of said Warren Act: Provided, that the provisions of this article shall not be construed to the prejudice of the District as to any benefit which otherwise would accrue through the enactment of future Federal legislation.

Shortage in Water Supply

13. On account of drought, inaccuracy in distribution or by reason of the requirements and use on the lands within the Rio Grande Federal Irrigation Project or by the use of municipalities supplied by the waters thereof, or other causes, there may be at times an insufficiency of water for district lands but in no event shall any liability accrue against the United States or any of its officers, agents or employees for any damage, direct or indirect, arising

therefrom, nor shall any charge provided for herein be reduced on account of any such shortage.

Waste and Seepage Water.

14. The District releases the United States, its officers, agents and employees from every claim for damage, direct or indirect, arising by reason of the presence of waste or seepage water on the lands of the District by reason of the water furnished the District as herein provided, or from any other cause.

Officials not to Benefit.

15. No Member of or Delegate to Congress, or Resident commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

Successors and Assigns Obligated.

16. The provisions of this contract shall apply to and bind the successors and assigns of the respective parties.

In Witness Whereof, the parties hereto have hereunto subscribed their names the day and year first above written.

THE UNITED STATES OF AMERICA,
By (S.) ELWOOD MEADOWS,
Commissioner, Bureau of Reclamation.
HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1.
By (S.) W. T. YOUNG.
President.

P. O. Address,
Fort Hancock, Texas

Attest:
C. J. MAPEL,
Secretary.

Extract From Minutes of a Meeting of the Board of Directors of Hudspeth County Conservation and Reclamation District No. 1, Held December 1, 1924.

The President laid before the Board for consideration the proposed contract between the District and the United States, for water service during the year 1925, and thereafter, and the Board having duly considered the same, the following resolution was unanimously adopted:

Be It Resolved: That the proposed contract between Hudspeth County Conservation and Reclamation District No. 1 and the United States of America

for water supply for the District for the year 1925 and thereafter, be and the same is hereby in all things approved and the President and the Secretary of the Board are hereby authorized and directed to execute the same on behalf of the District, and to take all steps which may be necessary in the premises.

We hereby certify that the above and foregoing is a true and correct copy of the resolution adopted, and of the portion of the minutes of the Board relating thereto, at a meeting of the Board duly and regularly held at the office of the District, on the first day of December, A. D. 1924, at which all of the members of the Board of Directors were present and consenting thereto.

(S.) W. T. YOUNG,
President.

Attest:

C. J. MAPEL,
Secretary.

Exhibit P-35 (a)—Photostat of Statement and Certificate of Award, dated 4/27/51; Omitted from the Printed Record, Pursuant to Designations of Counsel as to Printing Record, copied at Page 1, et seq

• • • • • • • •

United States Department of the Interior, Bureau of Reclamation.

Rio Grande Project.

Amendatory Contract for Rental of Water by Hudspeth County Conservation and Reclamation District No. 1.

This Contract, Made this 27th day of April, 1951 in pursuance of the Act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplementary thereto herein styled the Federal Reclamation Laws, by and between the United States of America, herein styled the United States, and the Hudspeth County Conservation and Reclamation District No. 1, an irrigation district organized and existing under and by virtue of the laws of the State of Texas, herein styled the District.

Witnesseth That:

2. Whereas, the United States and the District entered into a contract on December 1, 1924, in pursuance of the Federal Reclamation Laws, hereinafter referred to as the contract of 1924, by the terms of which the United States rented to the District a portion of the return flow, drainage and operational waste from the Rio Grande Project for a fixed rental for the year 1925 and for a rental, thereafter determined annually; and

3. Whereas, subsequent to the execution of said contract, the American Section of the International Boundary Commission, now the International Boundary and Water Commission, in the performance of its agreements with the Mexican Section of said Com-

mission, and in determination of the boundary between the United States and the Republic of Mexico, straightened the channel of the Rio Grande, and as a consequence of which certain of the return flow, drainage and operational waste from the Rio Grande Project became out of control of the District, and subject to hostile diversion; and,

4. Whereas, the said American Section of the International Boundary and Water Commission has now restored the conditions on the Rio Grande below El Paso insofar as they related to the availability of said Project return flow, drainage and operational waste for the use of the District which has materially changed the points of availability of water to the District and the manner by which it receives its water supply from the Project; and,

5. Whereas, the formula for rate computation stated in the contract of 1924, for years subsequent to 1925 is no longer appropriate, and has been varied from year to year by supplemental agreements which have been negotiated and executed annually in which there has been provided the amount to be paid each year; and,

6. Whereas, it is the desire of the parties hereto to determine by this contract the water rental due from the District to the United States hereafter without being compelled to continue the device heretofor employed of negotiating and executing annual supplemental contracts for such purposes; and,

7. Whereas, Project return flow, drainage and operational waste is available for district use, at the terminus of the Tornillo Main Canal if the project, or

in the Fabens Waste Channel at the diversion point of Hudspeth Feeder No. 1, and from the Tornillo Drain outlet.

Now Therefore, it is hereby agreed that said contract of 1924 be and the same is hereby amended in the following particulars, to-wit:

8. Article 6 if said contract of 1924 shall be and the same amended to read as follows:

"Rental of Water to District.

6. The United States has delivered to the district during the irrigation season of 1950, and will deliver thereafter during each irrigation season, such water as may be available through the following distribution facilities or others which may be constructed and useful in the future: The Tornillo Canal; the Fabens Waste Channel; The Outlet of the Tornillo Drain. So far as it may do so without additional project expense to the United States, it will endeavor to make waters available hereunder, to the end that the district may fully utilize such waters for the irrigation of its lands. The availability, the choice of distribution facilities, and the points of availability will be dependent upon operating conditions on the project, without the use of project storage. The Secretary of the Interior shall be at all times the sole judge of the availability of such water. The rental of water hereunder is secondary and inferior to the right to use of waters on the Rio Grande Federal Irrigation Project for any purpose. The district hereby relinquishes to the United States all right, title, interest and claim to any and all waters of the Rio Grande

vested in the District as of December 1, 1924, except as herein provided."

9. That Article 7 of said contract of 1924 shall be and the same is hereby amended to read as follows:

"Payment by District for Water.

7. For the delivery of water as available during the irrigation season of 1950 and thereafter, the District shall pay to the United States water rental charges upon terms and conditions as follows:

On or before May 1, 1951 and on or before January 15 of each year thereafter the Secretary or his duly authorized agent shall furnish the District a statement of the charges due for the preceding calendar year. The District shall pay to the United States the sum of one Dollar and Twenty five cents (125) for each acre irrigated within the District during the said preceding calendar year. The District not later than April 15, 1951 and not later than December 15 of 1951 and of each year thereafter shall furnish the Project Manager in charge of the Project a statement of the number of acres in the District actually irrigated during the same year. Provided: That for any year in which there is available to the District for diversion hereunder as determined by the Secretary or his duly authorized agent, a quantity of water available for diversions less than five (5) acre-feet per acre irrigated, during the irrigation season March 1st to September 30th, inclusive, the rental charge shall be reduced pro rata to the water actually available per irrigated acre of said District lands as determined by the Secretary or his duly authorized agent; for the computation of this adjustment, the figure of irrigated

area shall never exceed 18,000 acres; but the rate as adjusted shall apply to the total acres actually irrigated. The District shall pay such rental charges without regard to whether or not all water so available is actually taken by the District and used on its lands.

The said rental charges so determined shall be payable by the District as follows:

(a) All charges due under provisions of this Article shall be paid to the United States on or before June 15, 1951 and on or before March 1st of each year thereafter, such payment to be the charges due for the preceding calendar year."

10 Article 10 of said contract of 1924 shall be and the same is hereby amended to read as follows:

Measurement of Water.

10. The waters available to the District hereunder shall be measured at such point or points as determined by the Secretary or a duly authorized agent, and by such measuring and controlling devices as in the opinion of said Secretary or his duly authorized agents shall be required which devices shall be furnished, installed and maintained by the United States and shall be and remain at all times under the complete control of the United States. Records of measurements of such devices shall be available to both parties in this contract. Provided, that if for any reason the United States is unable to provide any such measuring or controlling devices for the purpose of measuring the water actually available to the District

at any of the points of measurement as provided in this contract, the amount of such water available to the District by the terms of this contract at any such point or points shall be estimated by the Secretary or his duly authorized representative, and such estimates shall be accepted by the parties hereto as governing the amount of water available to the District under the terms of this contract for which the District is obligated to pay the United States.

11. Article 11 of said contract of 1924 be, and is hereby amended to read as follows:

Control of Water by District after Delivery.

11. The District upon receiving the water delivered as herein provided shall at its own cost and expense divert and convey the same to the lands of the District and perform all acts necessary and required by law or custom in order to maintain its control over such waters in order to secure its beneficial application to the lands of the District. The District assumes full responsibility for the control and handling of said waters and for any damage that may result therefrom after its delivery by the United States at the point or points of delivery as provided for by the terms of this contract. All losses or diminution of such water by reason of seepage, evaporation or other causes after delivery by the United States at the aforementioned point or points of delivery shall be borne by the District.

12. Article 12 of said contract of 1924 be, and is hereby amended to read as follows:

Use of Water by District.

12. The water supplied under the terms of this contract shall be used solely for the purpose of distribution by the district for irrigation of lands in the district and such water shall be delivered by the district in accordance with and subject to the conditions and limitatiins of applicable provisions of the Federal Reclamation Laws provided; that upon written consent of the Secretary of the Interior, a portion of such waters may be used on lands outside the District.

13. Article 13 of said contract of 1924 be and is hereby amended to read as follows:

Shortage in Water Supply.

13. On account of drouth, inaccuracy in distribution, or by reason of the requirements and use within the Rio Grande Irrigation Project or by reason of use of project water transferred from project water right lands, for municipal purposes, or other causes, there may be at times an insufficiency of water for district lands but in no event shall any liability accrue against the United States or any of its officers, agents or employees, for any damage direct or indirect arising therefrom, nor shall any charge provided for herein be reduced on account of any such shortage except as provided in Article 7 hereof.

14. The contract of 1924 is further amended by the addition of the following article hereto:

Crop and Water Records to be Furnished.

17. The District shall keep and furnish to the United States such records and reports of irrigated area, crop and livestock products or census as the Secretary may require and shall furnish copies of any and all hydrographic records as may be useful to the United States and shall furnish assistance in the compilation and maintenance of useful water records to the extent possible with its regular operation personnel.

15. The said contract of 1924 is further amended by the addition of Article 18 thereto reading as follows:

Secretary Arbiter of Disputes Between the Parties Hereto.

18. In the event of disputes between the parties hereto arising out of this contract involving questions of fact, and insofar as the provisions hereof require a determination of fact to be made, the Secretary is hereby designated as the arbiter of such questions, and as the one required to make such determination of facts; and his decision thereon shall be conclusive and binding upon the parties hereto.

16 The contract of 1924 is further amended by the addition of Article 19 thereto reading as follows:

Emergency Operation of Hudspeth Cross Feeder Canal.

19. To meet emergency conditions when water available at the terminus of the Tornillo Canal or the Fabens Waste Channel is insufficient to provide service to the upper unit of the District above its Alamo Feeder Canal, the District may divert Tornillo Drain water into its Cross Feeder Canal leading from the Tornillo Drain outlet to the District's Main Canal. The Tornillo Drain may be checked to accomplish the above diversion by gravity for not to exceed ten days during any thirty-day period. Diversions for any longer periods shall be accomplished by pump lift. The District shall advise the Bureau by written notice in advance when checking of the Tornillo Drain is to begin and cease, and this privilege of checking the Tornillo Drain may be suspended at any time upon 30 days written notice given by the United States to the District, and thereafter, any use made of the privilege granted herein to divert Tornillo Drain water shall be accomplished exclusively by pump lift. The District assumes all responsibility or loss from damage or injury resulting from or caused by checking the Tornillo Drain or from pumping therefrom into its Cross Feeder Canal and agrees to save and hold the United States and the El Paso County Water Improvement District No. 1, harmless from any claims arising therefrom or in connection therewith, and shall hold the United States, the El Paso County Water Improvement District No. 1, and their agents, officers, employees, successors and assigns free from any expense or loss as a result of the exercise of said permit in connection with said Tornillo Drain and the District's Cross Feeder Canal.

17. Except as herein modified the said contract of 1924 shall remain in full force and effect.

Officials Not to Benefit.

18. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

In Witness Whereof, The parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,
By (S.) A. U. THOMPSON,
Acting Regional Director.
HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1.
By (S.) J. T. McKINNEY,
(J. T. McKinney),
President.

Attest:
(S.) W. F. HARGROVE, JR.,
(W. F. Hargrove, Jr.),
(Seal) Secretary Pro Tem.

Certified Copy of Resolution.

I, W. F. Hargrove, Jr., Secretary Pro Tem of the Hudspeth County Conservation and Reclamation District No. 1, do hereby certify that at a regular

meeting of the Board of Directors of said District, held at the offices of said District, at Fort Hancock, Texas, on Thursday, April 19, 1941, a quorum being present, the following resolution was unanimously adopted:

Be It Resolved that the contract between the United States of America and the Hudspeth County Conservation and Reclamation District No. 1, entitled "Rio Grande Project—Amendatory Contract for Rental of Water by Hudspeth County Conservation and Reclamation District No. 1", transmitted to the District in a letter dated April 13, 1951, from L. R. Fiock, Project Manager, to J. T. McKinney, President of the District, be, and the same is hereby approved, and the President of the District is authorized to execute the same, and the Secretary or Secretary Pro Tem of the District is authorized to attest the same on behalf of the District.

Witness my hand and the seal of the Hudspeth County Conservation and Reclamation District No. 1, this 19th day of April, 1951.

(S.) W. F. HARGROVE, JR.,
(W. F. Hargrove, Jr.),
(Seal) Secretary Pro Tem.

(At this point an instrument was marked for identification as Plaintiffs' Exhibit 36 and handed to opposing counsel for examination.)

Q. Mr. Resch, I hand you an exhibit marked "Plaintiffs' Exhibit No. 36", consisting of five sheets, and ask you what is that?

A. Exhibit 36 are graphs showing the discharge of the Rio Grande at El Paso from 1889 through 1951, and the final summary graph, which shows the length of periods of low flow in the Rio Grande above El Paso by days. By that I mean that from this graph you can determine the number of days in which the flow did not exceed one hundred cubic feet per second. Likewise, the first graphs reflect, by their construction, the periods of maximum flows and the periods of minimum flows, as may be illustrated.

Mr. Grambling:

Your Honor, before this witness goes too deep in this, I would like to ask him a few questions and see what he bases these graphs on, where they come from, or did he prepare them or somebody else prepare them.

The Court:

All right, ask him.

Examination On Voir Dire.

Questions by Mr. Grambling:

Q. Mr. Resch, did you prepare these graphs?

A. Yes, these graphs were prepared under my supervision in our office here in El Paso. The later portion of the graph was prepared in collaboration with Mr. Raymond A. Hill, who is a consultant of the District.

Q. You mean he worked with you?

A. Yes, sir.

Q. Now, on that 1889 graph you, of course, weren't here then?

A. No, sir.

Q. The graph goes back to 1889. Where did the information come from?

A. The information from the early years was taken from publications of the United States Geological Survey.

Q. Which are published by the Survey?

A. Yes, sir.

Mr. Grambling:
That is all.

Mr. Sims:
No objection.

Mr. Edwards:
Is the exhibit received in evidence?

The Court:
Yes.

(Plaintiffs' Exhibit 36, consisting of five sheets, was thereupon admitted in evidence by the Court and photostatic copies of same appear on the following pages.)

Note

Page 640 is on Card 11;
Pages 641-644 are on Card 12.

On Direct Examination (Cont'd).

Questions by Mr. Edwards:

Q. Mr. Resch, do you have a duplicate of this with you here or not?

A. No, sir, not here in the Courtroom.

Q. All right, going back to 1889, the graphs, by indicating no line here at the bottom, indicates that there was no flow during that period of time, is that correct?

A. Yes, sir.

Q. And it is marked here the number of days when the flow was zero second feet was 144 days?

A. Yes, sir.

Q. That means that in 1889 there were 144 days out of that year when there was zero flow?

A. Yes, sir.

Q. And the same is true then—

A. The same entry is made on each year. That is the number of days the flow was zero, the number of days the flow ranged up to 25 second feet, the number of days it ranged between 26 and 50 second feet, and the number of days the flow ranged from 51 to 100 second feet.

Q. And on the last graph over here will you explain, please, the part of the graph which is double-hatched and the part which is single-hatched?

A. The portion of the bars there that are double-hatched indicate the days of zero flow, and the parts that have a single diagonal hatching represents the days in which the flow was 100 second feet or less. The two graphs together will give you the total number of days in which the flow did not exceed 100 cubic feet per second.

Q. Will you just start at the top beginning with 1897 and run down through 1913 and interpret those graphs for the record?

A. In 1897, reading from the scale, this is approximately. It is indicated that the days of zero flow in the Rio Grande at El Paso was approximately 8 days. The days in which the flow was less than 100 second feet, or did not exceed 100 second feet, is about 62 days. In 1898 there were no days of zero flow, but for approximately 125 days the flow did not exceed 100 cubic fet per second. In 1899, there were approximately 166 days of zero flow, and a total of about 258 days in which the flow did not exceed 100 cubic feet per second. In 1900 there were approximately 172 days of zero flow and about 282 days in which the flow did not exceed 100 cubic feet per second. In 1901 there were approximately 112 days of zero flow and approximately 197 days in which the flow did not exceed 100 cubic feet per second. In 1902 there were approximately 155 days of zero flow and approximately 286 days in which the flow did not exceed 100 cubic feet per second. In 1903 there were approximately 20 days of zero flow and approximately 200 days in which the flow did not exceed 100 cubic feet per second. In 1904 there were approximately 162 days of zero flow, and approximately 245 days in which the flow did not exceed 100 cubic feet per second. In 1905, there were no days of zero flow, and approximately 58 days in which the flow did not exceed 100 cubic feet per second. In 1906 there were no zero flow days, and approximately 25 days in which the flow did not exceed 100 cubic feet per second. In 1907 there were no days of zero flow and no days in which the flow did not exceed 100 cubic feet per second. In 1908 there were approximately 63 days of zero flow and approxi-

mately 86 days in which the flow did not exceed 100 cubic feet per second. In 1909 there were approximately 25 days of zero flow and approximately 45 days in which the flow did not exceed 100 cubic feet per second. In 1910 there were approximately 156 days of zero flow and approximately 192 days in which the flow did not exceed 100 cubic feet per second. In 1911 there were approximately 5 days of zero flow and approximately 46 days in which the flow did not exceed 100 cubic feet per second. In 1912 there were approximately 10 days of zero flow and approximately 55 days in which the flow did not exceed 100 cubic feet per second. In 1913 there were approximately 86 days of zero flow and approximately 145 days in which the flow did not exceed 100 cubic feet per second.

Q. Now, Mr. Reich, for the record explain, please, what a cubic feet per second of water is.

A. A cubic feet per second is one cubic foot of water flowing at the rate of one foot per second.

Q. And for irrigation purposes just how much of a flow would a hundred cubic feet per second amount to?

A. A hundred cubic feet per second, as measured in the Rio Grande at El Paso, would probably irrigate approximately a thousand acres of land in the El Paso Valley, depending on its location with respect to distance from El Paso.

Q. You mean an average flow throughout the year for that amount?

A. Yes, sir, because during the summer months you would have less use of water as a result of increased evaporation from that water as it passed into your distribution system and through it.

Q. So then an average flow of a hundred cubic feet per second would take care of only a thousand acres of land?

A. Approximately, yes, sir.

Q. And how many acres are there in the project in Texas?

A. There are 68,917 acres of first-class water right land in the El Paso County Water Improvement District Number One.

Q. This graph which you have covers the years 1907 to 1913. Is that prior to the construction of Elephant Butte Dam?

A. I beg your pardon, sir, with respect to the dates of the graphs that we were quoting, is 1897.

Q. Pardon me. 1897.

A. To 1913.

Q. Yes. That was all prior to the construction of the Elephant Butte Dam?

A. It was prior to that, and in 1912 and 1913 Elephant Butte Dam was under construction.

Q. But that reflects what the river was doing at El Paso uninfluenced by Elephant Butte Dam?

A. Yes, sir.

Q. Mr. Resch, I hand you an exhibit, marked "Plaintiffs' Exhibit No. 37" (Reporter marks same), consisting of five sheets, and ask you to examine them and state what it is?

A. These are graphs showing the annual flow or discharge of the Rio Grande at San Marcial, 1895 through 1951. These graphs also indicate the days of zero flow, the days the flow was from 1 to 500 cubic feet per second, and the days the flow was from 501 to 1,000 cubic feet per second.

Q. Now, where is San Marcial, as regards Elephant Butte Reservoir?

A. San Marcial is located immediately above the head waters, or the head of Elephant Butte Reservoir.

Q. And is that the point at which for a great many years the inflow into Elephant Butte Reservoir was measured after construction of the dam?

A. Yes, sir, that is correct.

Q. And what is the final sheet of this exhibit?

A. The final graph is the annual calendar year flow of the Rio Grande at San Marcial in acre feet from 1897 to October 31, 1954.

(Ex. "P-37" admitted in evidence at this point and photostatic copies of same appear on the following pages.)

Note

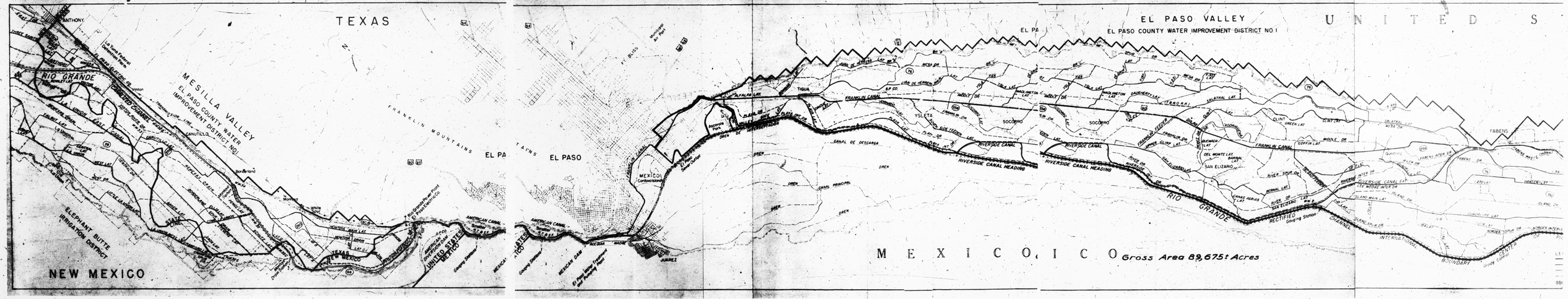
Page 650 is on Card 12;
Pages 651-654 are on Card 13.

Q. Now, Mr. Resch, what does this graph disclose by years as to the flow at San Marcial?

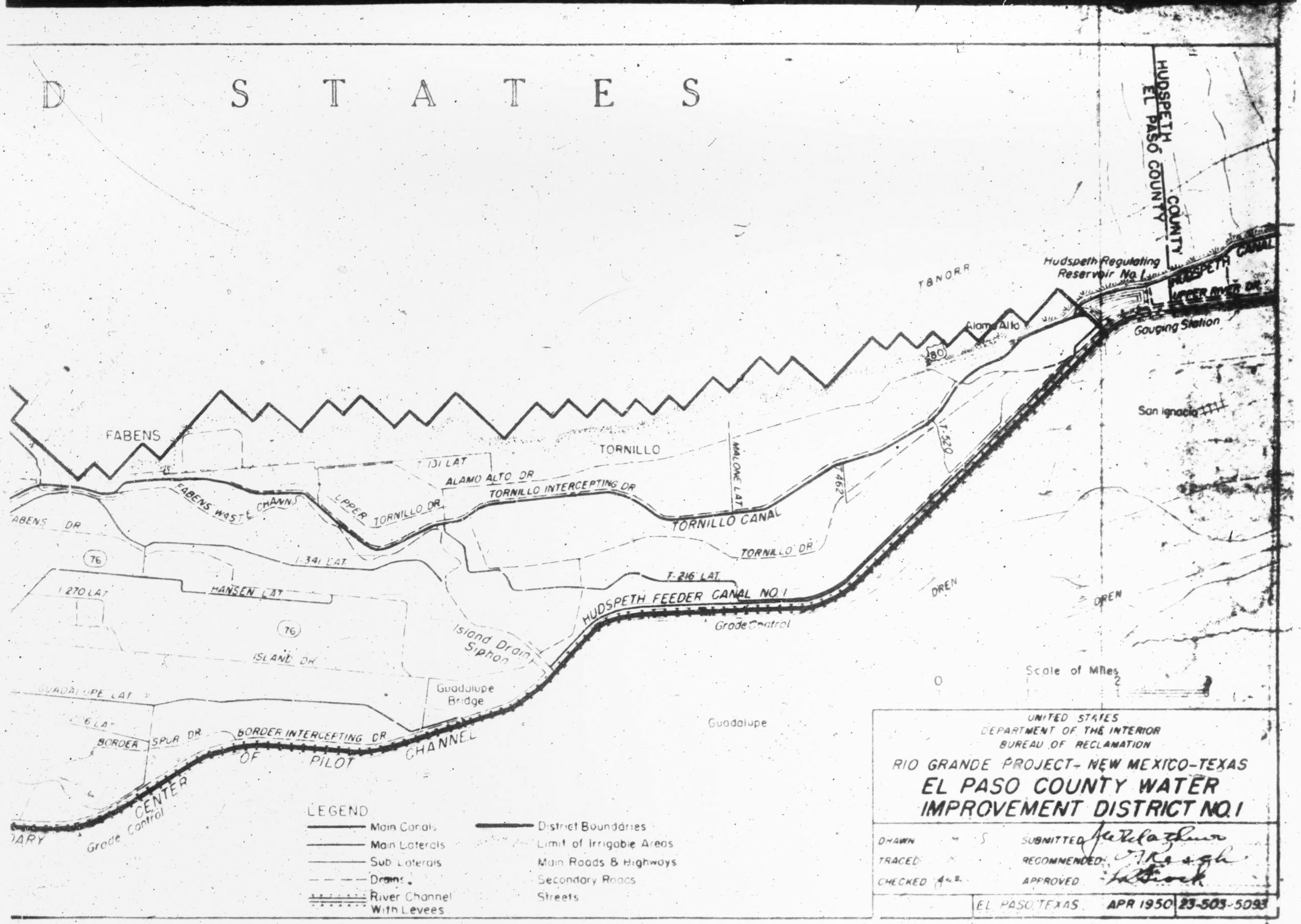
A. In 1895, which is a year of partial record, in that there does not appear to be a record from September to December—

Q. Well, let's omit that in which there wasn't a full record then. Go on to the next year.

A. In 1896, which is a year of full record, there were 98 days of zero flow, 97 days in which the flow was between 1 and 500 cubic feet per second, 91 days in which the flow was between 501 and 1,000 cubic feet per second. In 1897 there were no days of zero flow, there were 92 days in which the flow was between 1 and 500 cubic feet per second, and 96 days in which the flow was 501 to 1,000 cubic feet per second. In 1898, there were 41 days of zero flow, 104 days in which the flow was between 1 and 500 cubic feet per second, and 89 days in which the flow was between 501 and 1,000 cubic feet per second. In 1899, there were 101 days of zero flow, 207 days of flow between 1 to 500 cubic feet per second, and 36 days of flow from 501 to 1,000 cubic feet per second. In 1900, there was 91 days of zero flow, and 154 days in which the flow was 1 to 500 cubic feet per second, and 75 days in which the flow was from 501 to 1,000 cubic feet per second. In 1901, there was 17 days of zero flow, there was 216 days in which the flow was from 1 to 500 cubic feet per second, and there was 27 days in which the flow was 501 to 1,000 cubic feet per second. In 1902, there were 86 days of zero flow, 243 days in which the flow was 1 to 500 cubic feet per second, and 15 days in which the flow was from 501 to 1,000 cubic feet per second. In 1903 there were 39 days of zero flow, 192 days in which the flow was from 1 to 500, and 33 days in which the flow was from 501 to


TEXAS
EL PASO VALLEY
EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1
UNITED S
MESILLA VALLEY
EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1
RIO GRANDE
ANTHONY
CANUTILLO
FRANKLIN MOUNTAINS
EL PA
EL PASO
FT. BLISS
TIGUA
YSLETA
SOCORRO
CLINT
FABENS
SAN ELIZARIO
RIVERSIDE CANAL
RIVERSIDE CANAL HEADING
FRANKLIN CANAL
CANAL DE DESCARGA
CANAL PRINCIPAL
MEXICO
JUAREZ
MEXICAN DAM
AMERICAN CANAL
UNITED STATES
MEXICO
TEXAS
NEW MEXICO
ELEPHANT BUTTE IRRIGATION DISTRICT
RIO GRANDE
RECTIFIED CHANNEL
INTERNATIONAL BOUNDARY CENTER
MEXICO
Gross Area 89,675± Acres

D S T A T E S



LEGEND

- Main Canals
- Main Laterals
- Sub Laterals
- Drains
- River Channel With Levees
- District Boundaries
- Limit of Irrigable Areas
- Main Roads & Highways
- Secondary Roads
- Streets

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

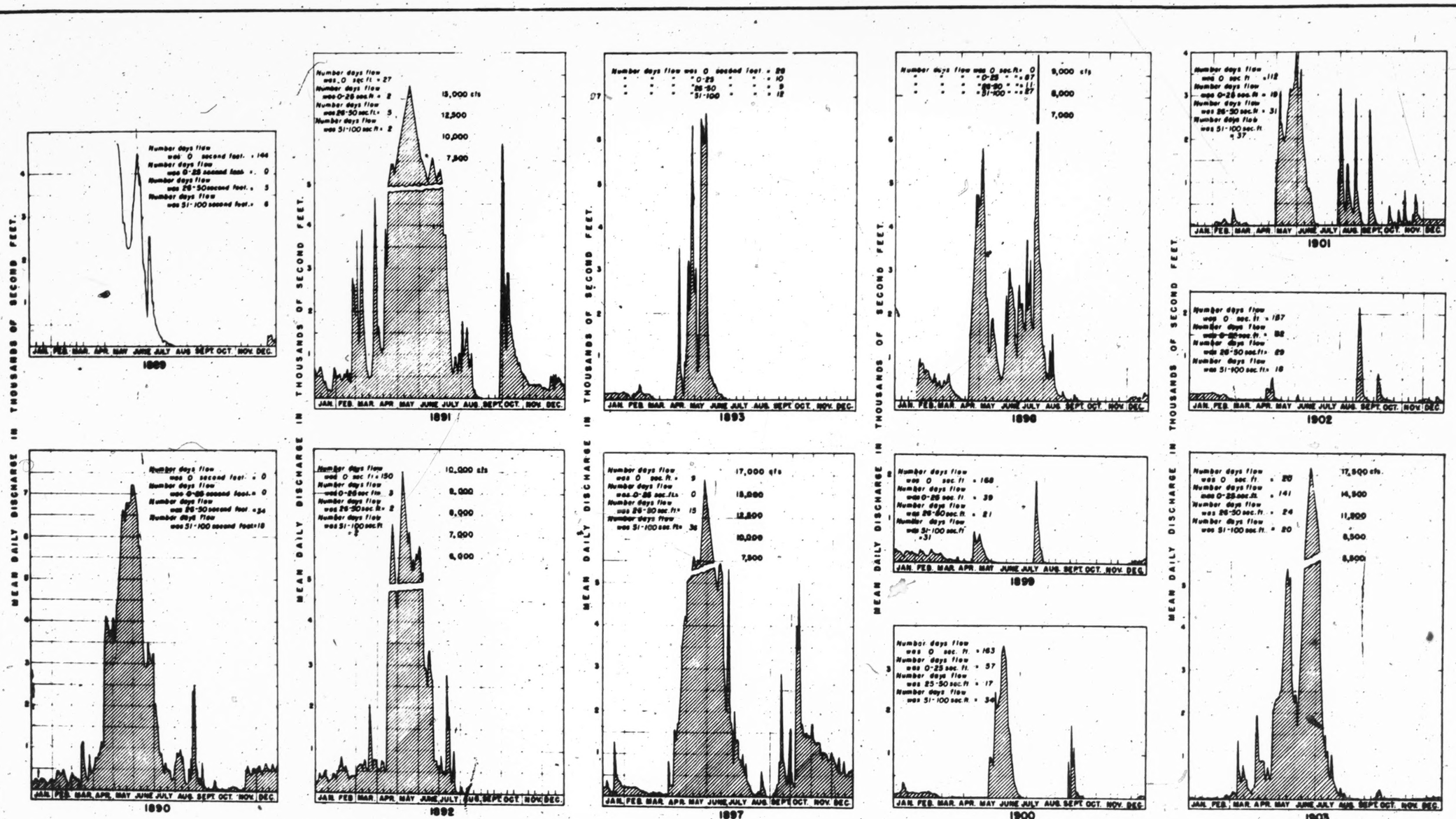
RIO GRANDE PROJECT- NEW MEXICO-TEXAS

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

DRAWN	M S	SUBMITTED	
TRACED	X	RECOMMENDED	
CHECKED	A.L.B.	APPROVED	

EL PASO, TEXAS. APR 1950 | 23-503-5093

F-35



NOTE

Information concerning the years 1894, 1895 and 1896 was not available.

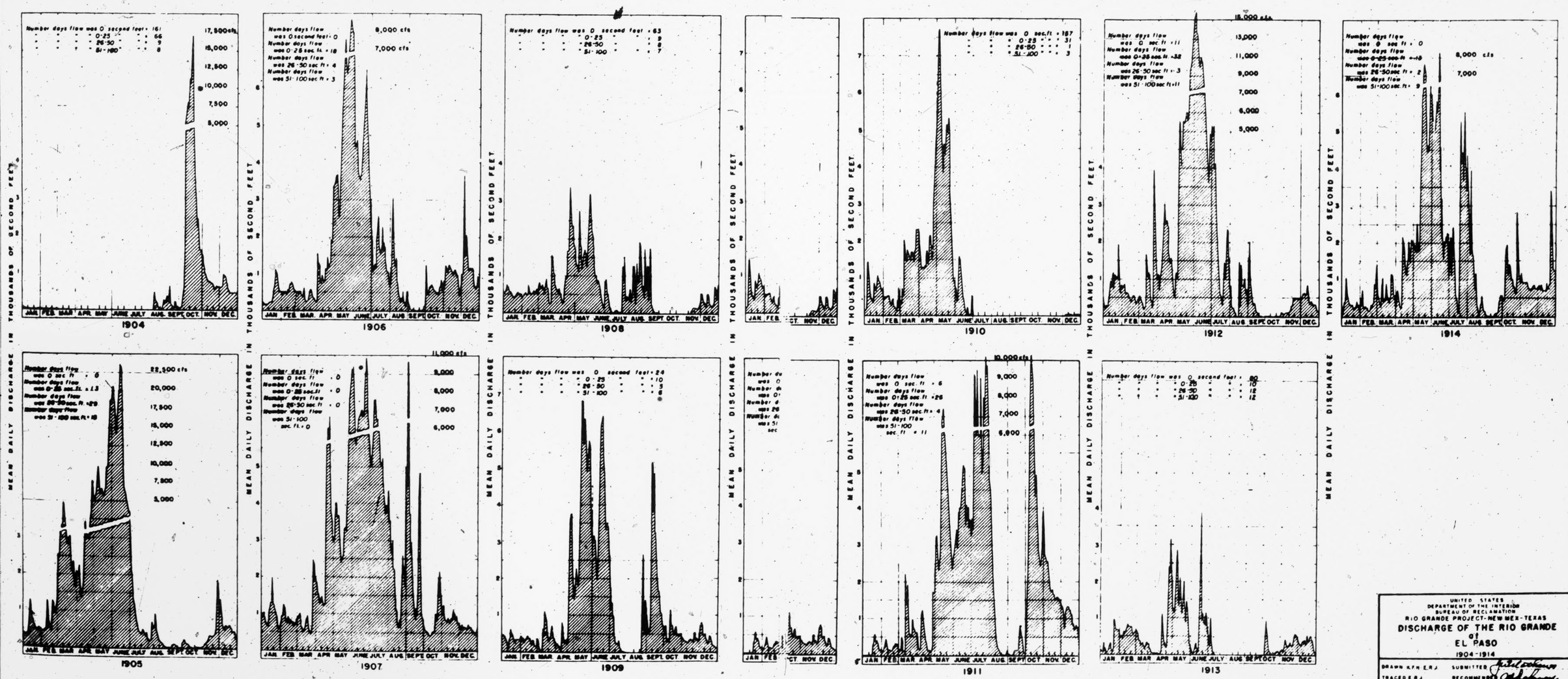
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
RIO GRANDE PROJECT- NEW MEX.-TEXAS

DISCHARGE OF THE RIO GRANDE at EL PASO
1889 - 1903

DRAWN E.F.H.-E.R.A. SUBMITTED
TRACED E.R.A. RECOMMENDED
CHECKED E.F.H. APPROVED
EL PASO, TEXAS, DEC. 26, 1939.
SCALE 1 IN. = 5000 CFS.

23-SCU-6468.

"P-36" (Second sheet)



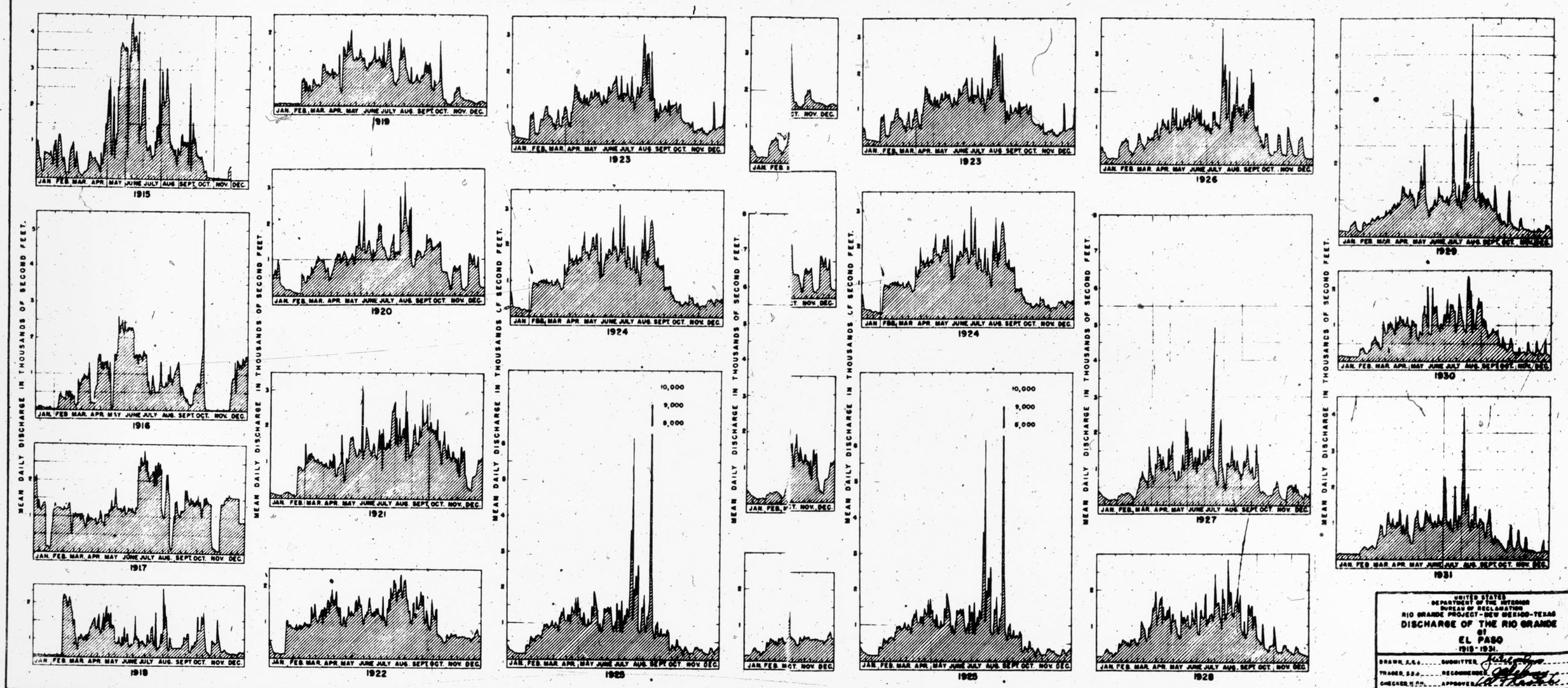
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
RIO GRANDE PROJECT-NEW MEX-TEXAS

DISCHARGE OF THE RIO GRANDE at EL PASO

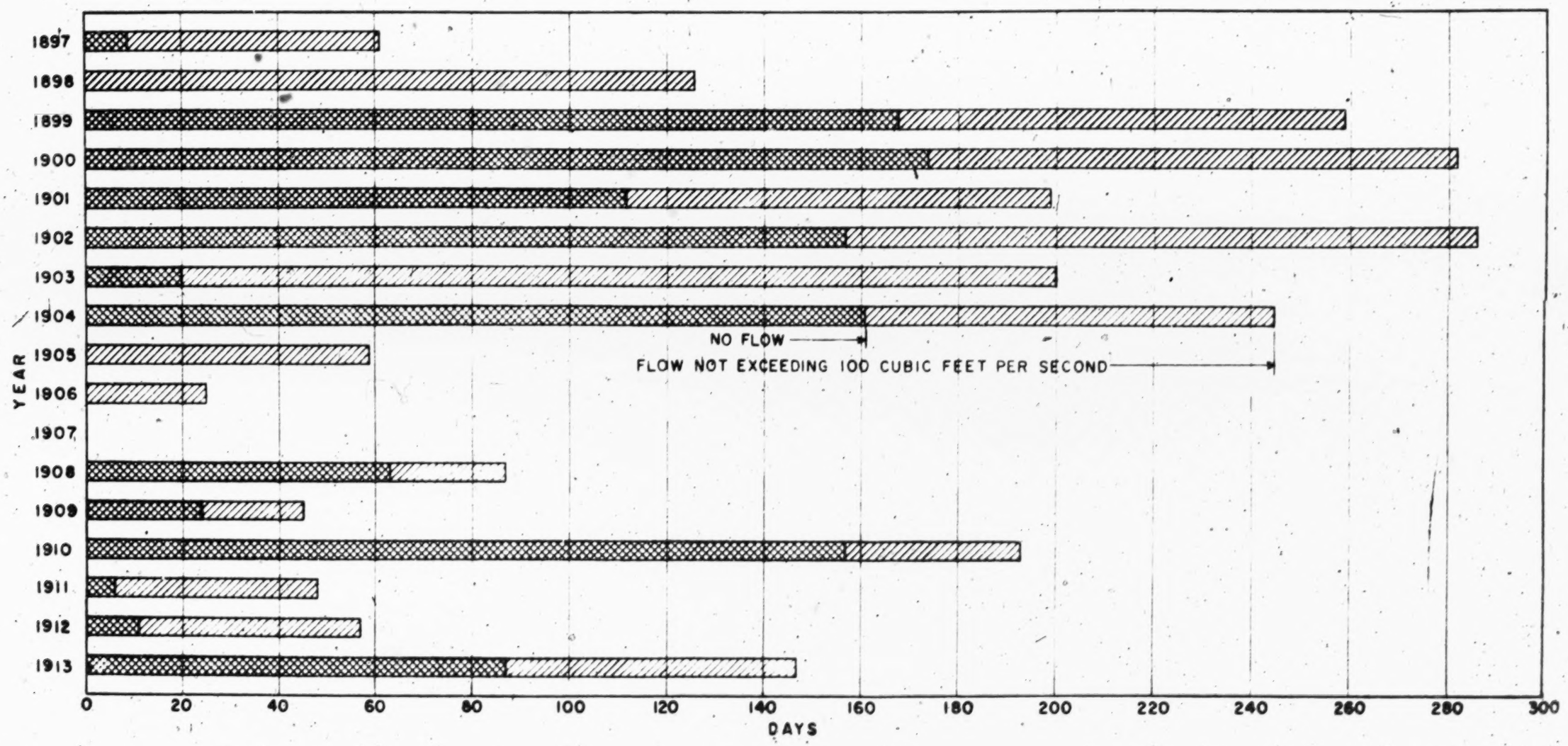
1904-1914

DRAWN K.F.H. E.R.J.
TRACED E.R.J.
CHECKED H.F.H.
SUBMITTED
RECOMMENDED
APPROVED
EL PASO, TEXAS
AMARILLO, TEXAS
23-503-5459

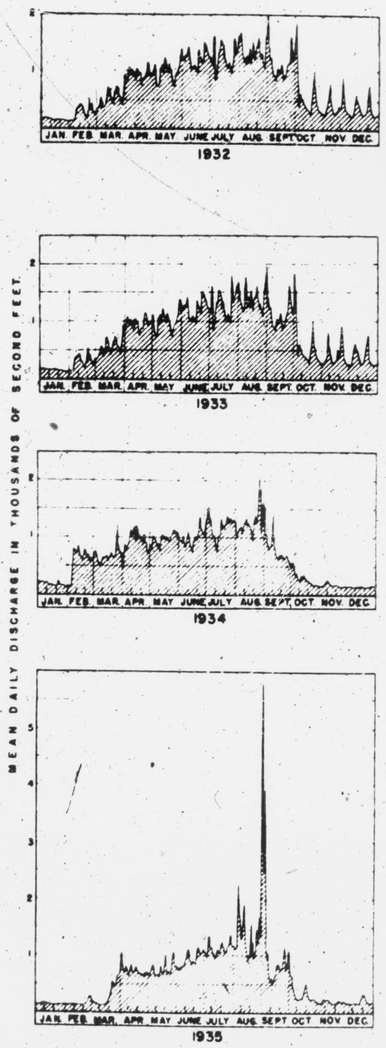
"P-36" (Third sheet)

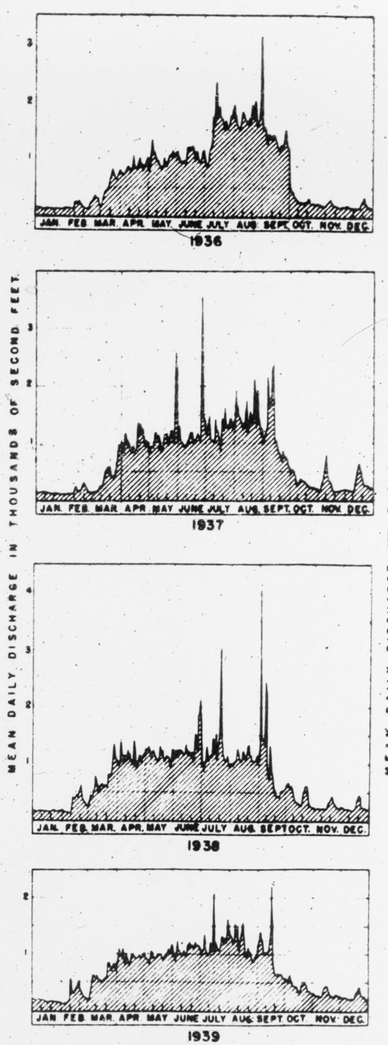


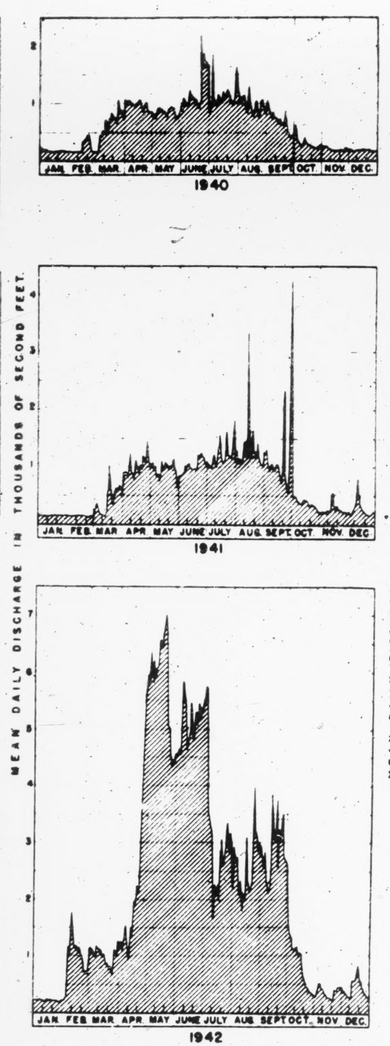
LENGTH OF PERIODS OF LOW FLOW
IN
RIO GRANDE ABOVE EL PASO
PRIOR TO
CONSTRUCTION OF ELEPHANT BUTTE DAM

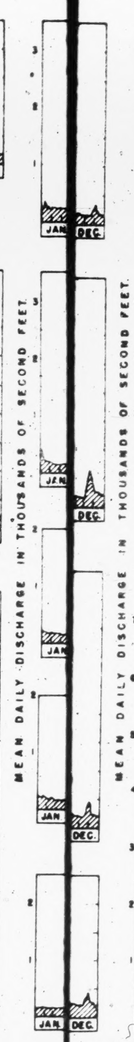


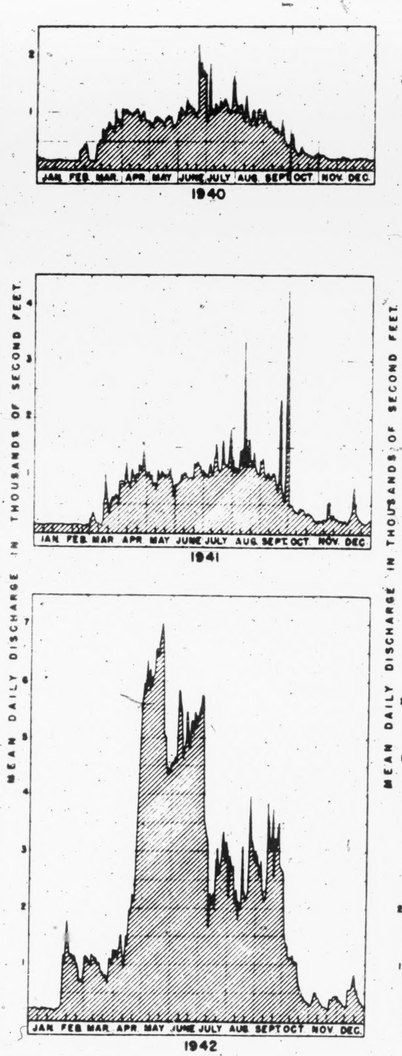
"P-36" (Fourth sheet)

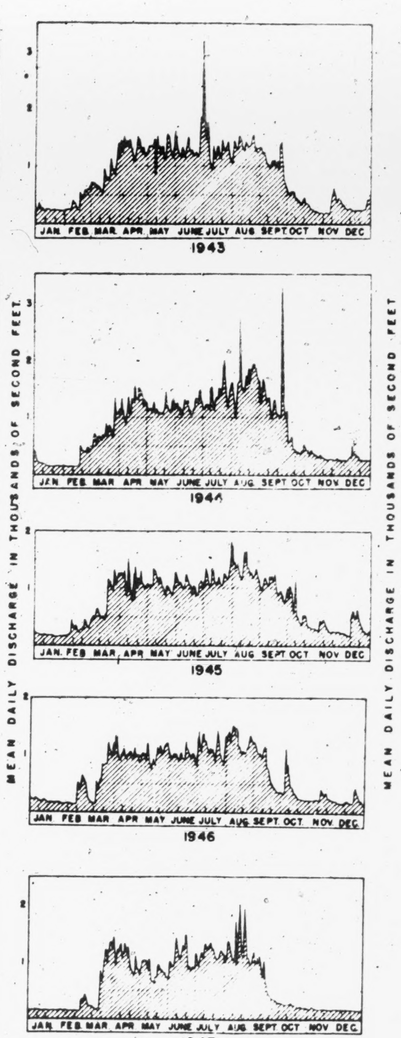


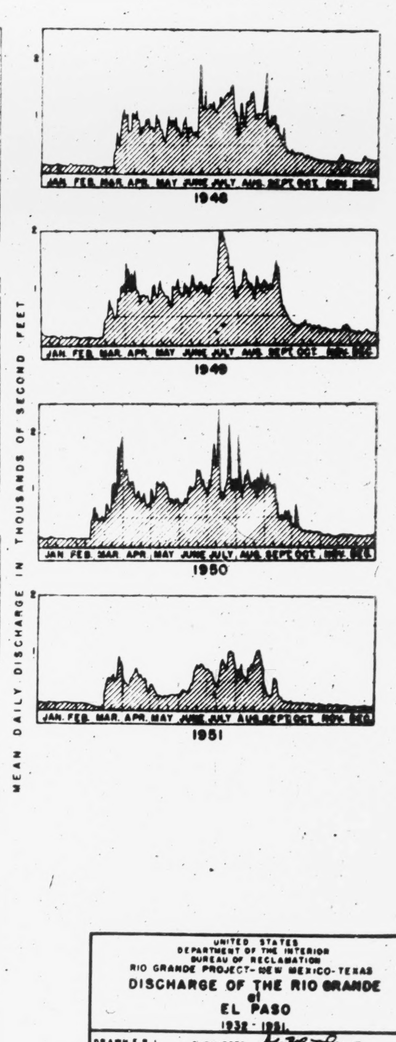












UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
RIO GRANDE PROJECT - NEW MEXICO - TEXAS

DISCHARGE OF THE RIO GRANDE at EL PASO

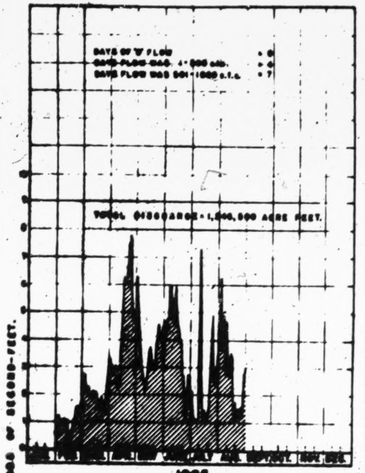
1932 - 1951.

DRAWN E.R.J.
TRACED E.R.J.
CHECKED H.P.M.
EL PASO, TEXAS MAR 31, 1952
SHEET 4 OF 4 SHEETS

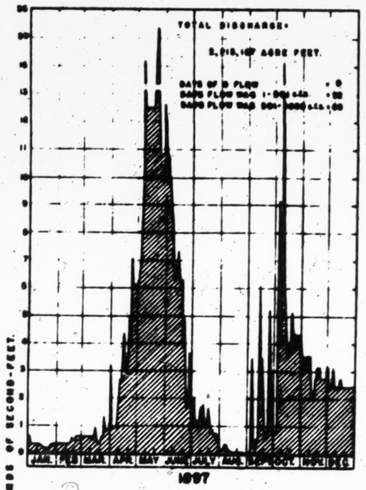
SUBMITTED
RECOMMENDED
APPROVED

23-303-5461.

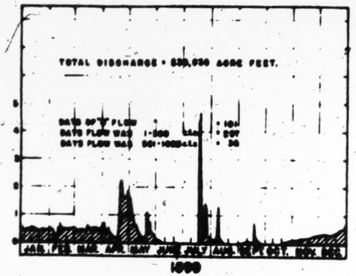
"P-37" (First sheet)



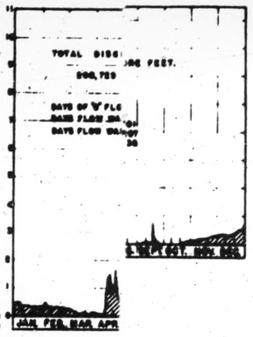
1896

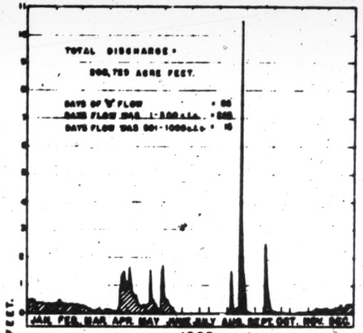


1897

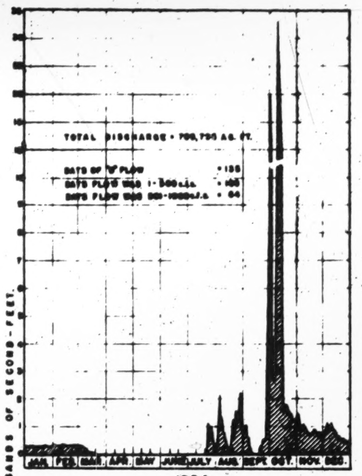


1899

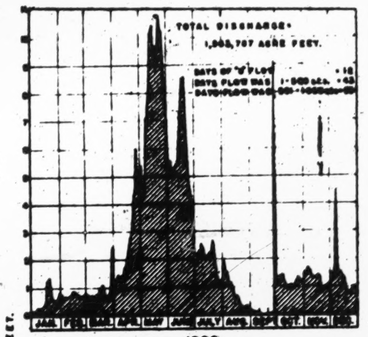




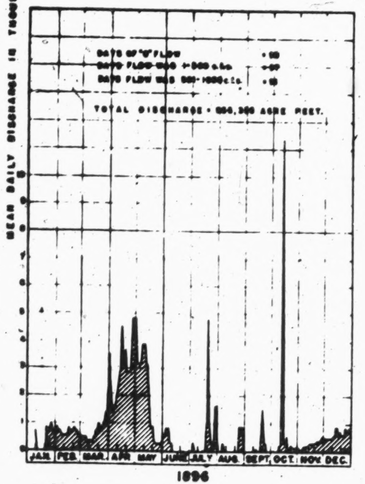
1902



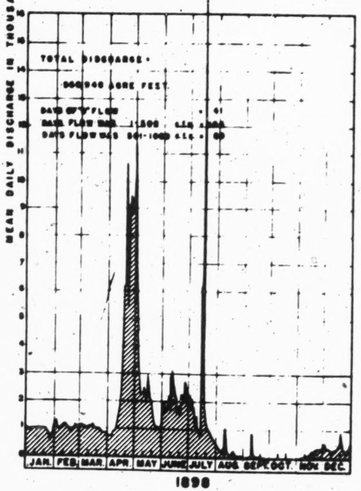
1904



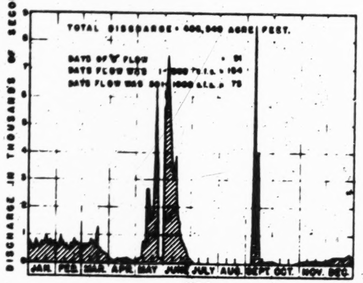
1906



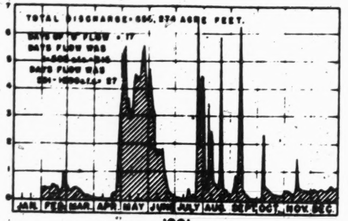
1896



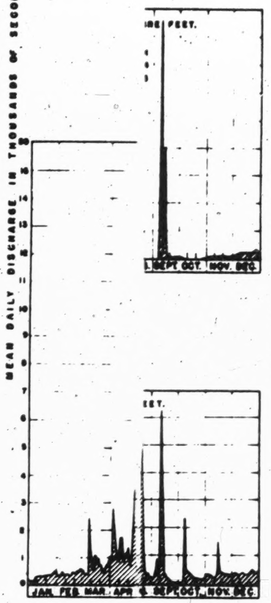
1898

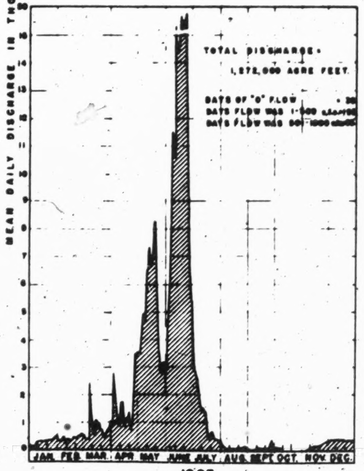


1900

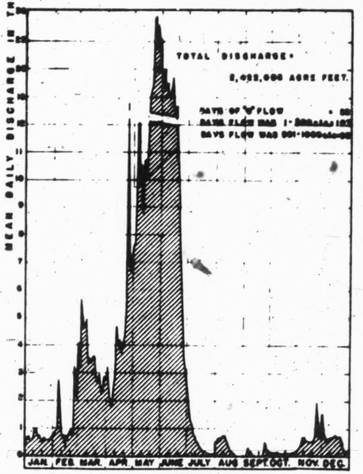


1901

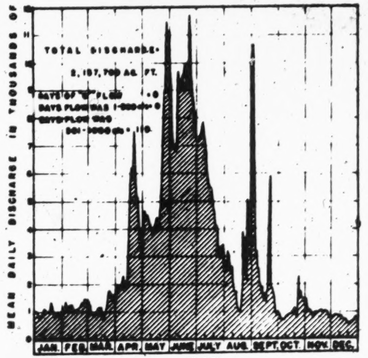




1903



1905



1907

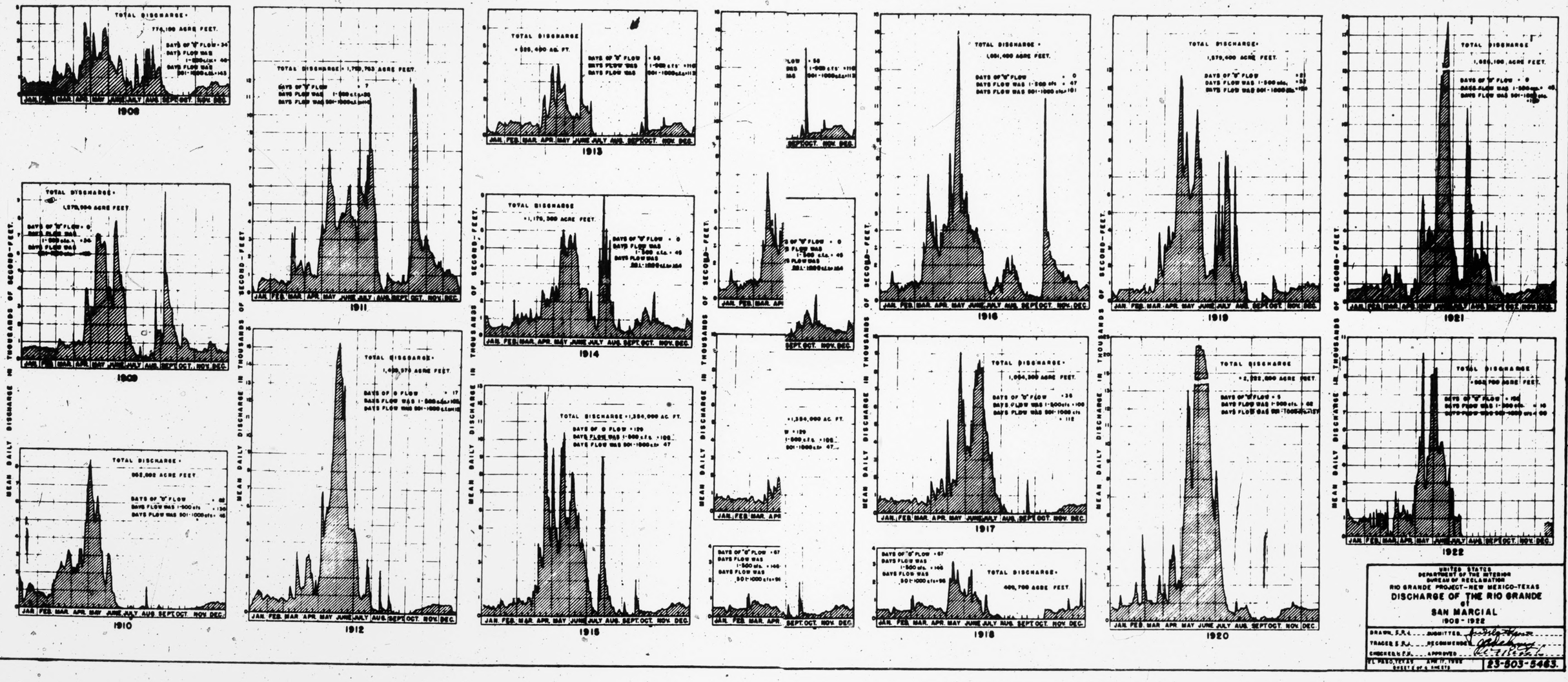
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
RIO GRANDE PROJECT - NEW MEXICO-TEXAS

DISCHARGE OF THE RIO GRANDE AT SAN MARCIAL
1895 - 1907

DRAWN S.P.A. SUBMITTED
TRACED S.P.A. RECOMMENDED
CHECKED S.P.A. APPROVED
EL PASO, TEXAS JUNE 19, 1933
SHEET 1 OF 2 SHEETS

23-503-5468

"P-37" (Second sheet)



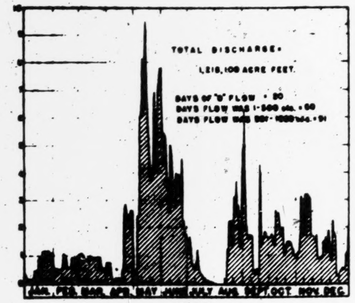
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
RIO GRANDE PROJECT-NEW MEXICO-TEXAS

DISCHARGE OF THE RIO GRANDE
AT
SAN MARCIAL
1908 - 1922

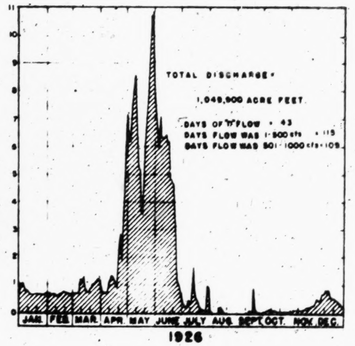
DRAWN S.R.L. AUDITED
TRACED S.R. RECOMMENDED
CHECKED R.P.H. APPROVED
EL PASO, TEXAS AUG 11 1922
SHEET 2 OF 2 SHEETS

23-503-5463.

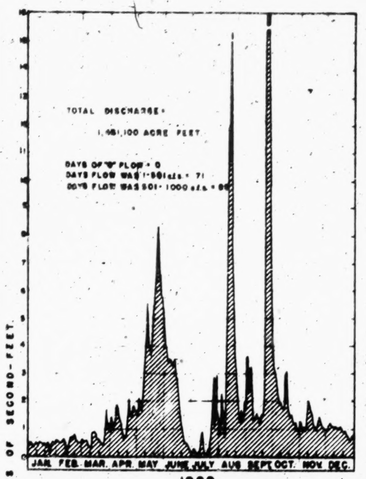
"P-37" (Third sheet)



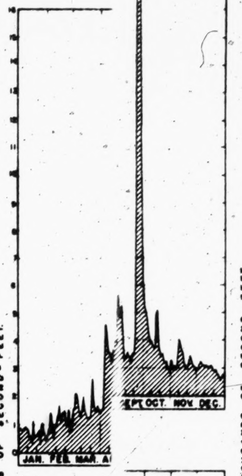
1923

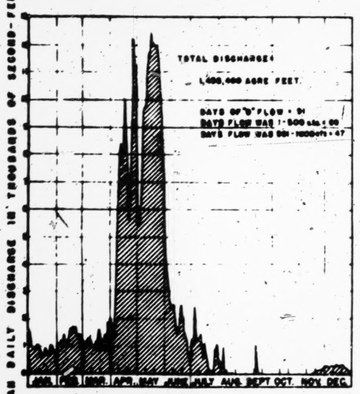


1926

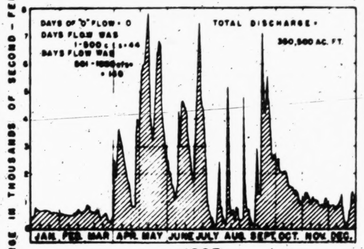


1929

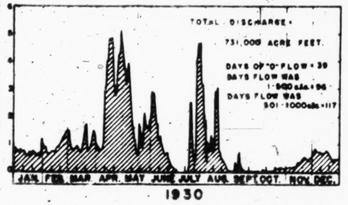




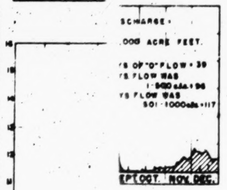
1924

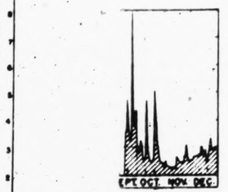


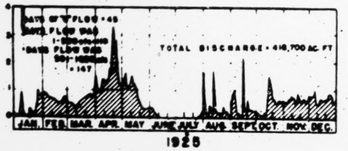
1927



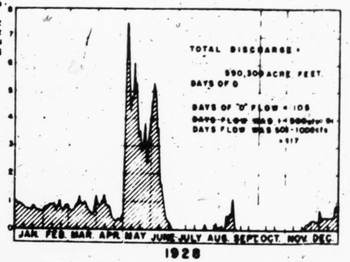
1930



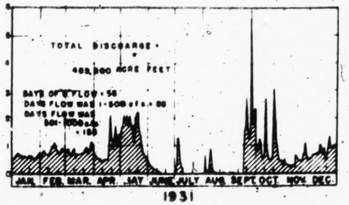




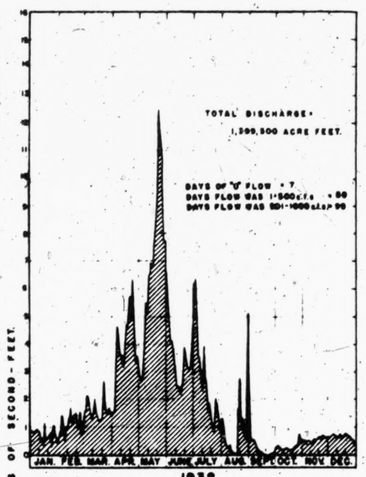
1925



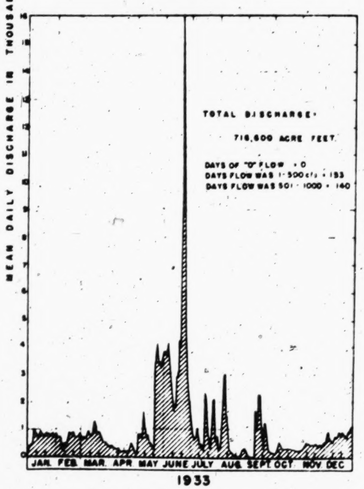
1928



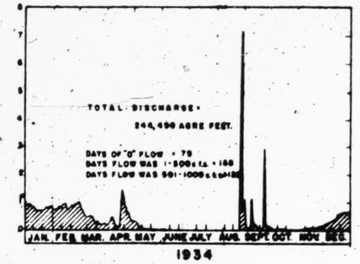
1931



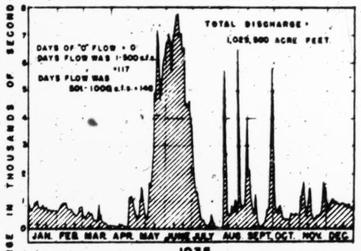
1932



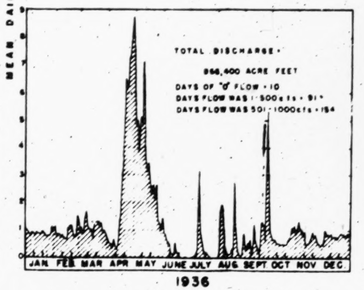
1933



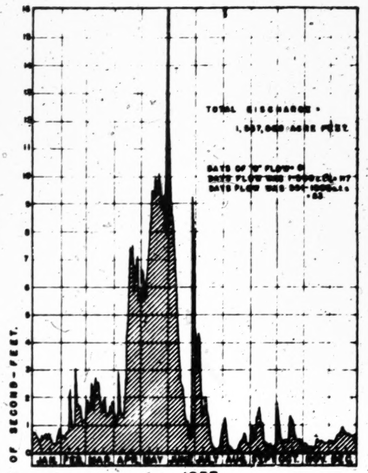
1934



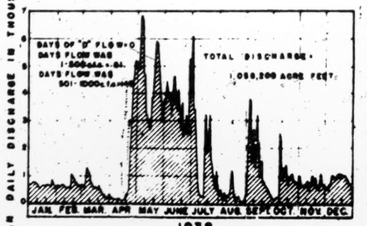
1935



1936



1937



1938

MEAN DAILY DISCHARGE IN THOUSANDS OF SECOND-FEET.

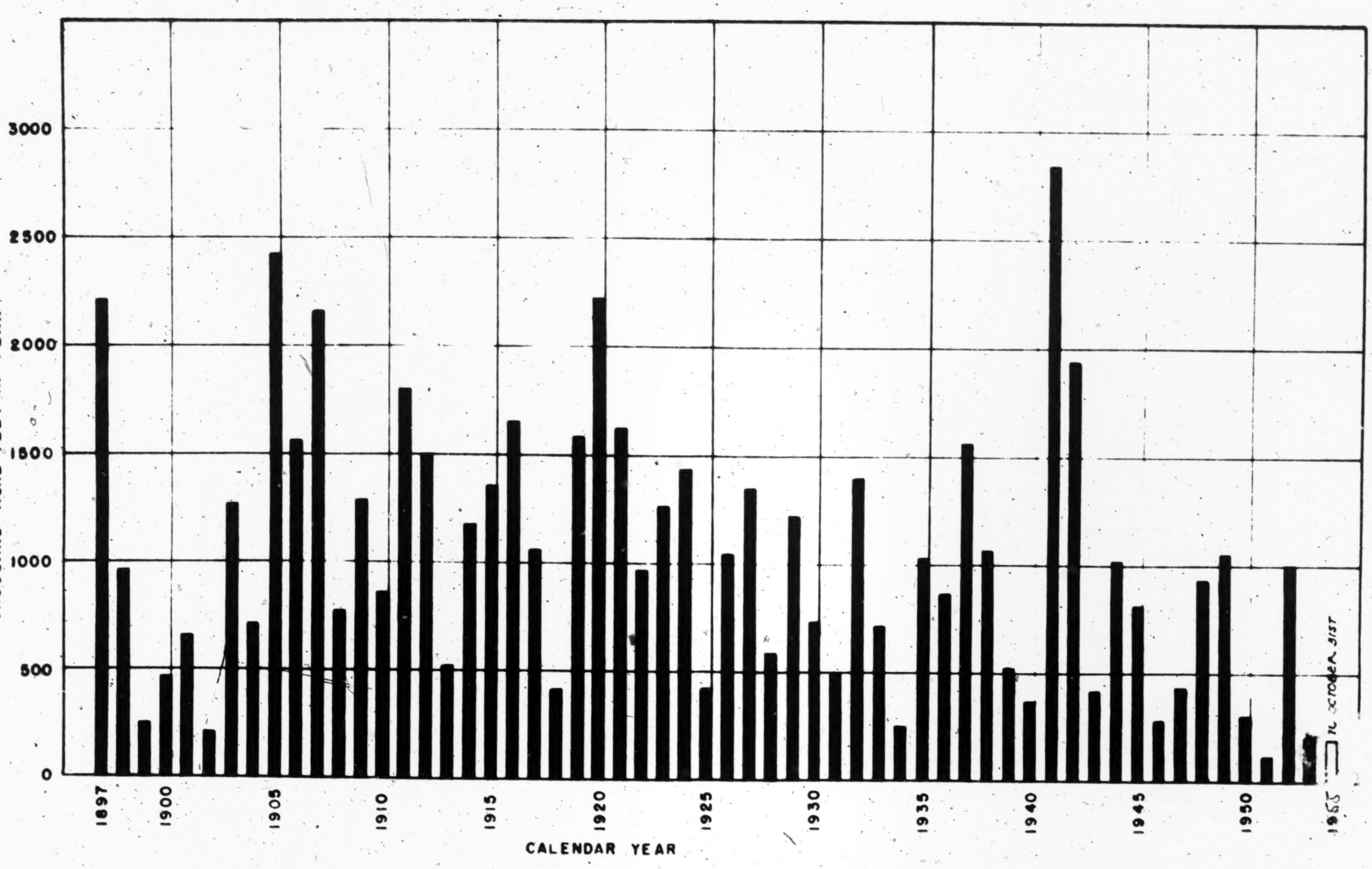
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
RIO GRANDE PROJECT-NEW MEXICO-TEXAS
DISCHARGE OF THE RIO GRANDE
AT
SAN MARCIAL
1923-1938

DRAWN E.R.J.
TRACED E.R.J.
CHECKED F.H.
SUBMITTED
RECOMMENDED
APPROVED
EL PASO, TEXAS, JUNE 28, 1939
SHEET 3 OF 4 SHEETS

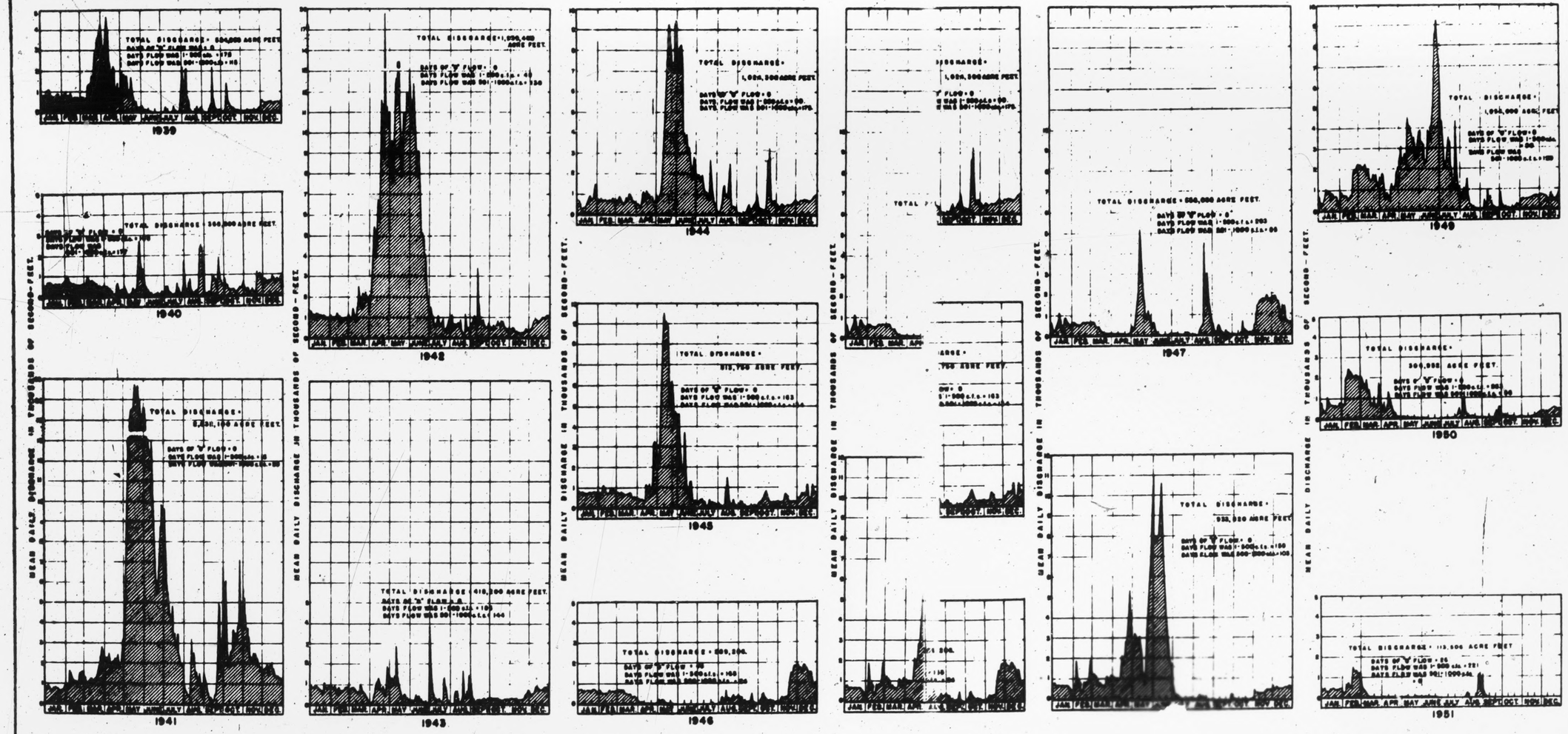
23-503-5464.

"P-37" (Fifth sheet)

RIO GRANDE AT SAN MARCIAL



"P-37" (Fourth sheet)



NOTE

Data for period October 1949 through September 1951 based on provisional USGS records.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
RIO GRANDE PROJECT-NEW MEXICO-TEXAS

DISCHARGE OF THE RIO GRANDE
at
SAN MARCIAL
1939 - 1951.

DRAWN E.R.J. SUBMITTED
TRACED E.R.J. RECOMMENDED
CHECKED H.F.K. APPROVED
EL PASO, TEXAS APR. 24, 1952
SHEET 4 OF 4 SHEETS.

23-503-5465.

AMERICAN DAM PROTECTIVE WORKS - EL PASO COUNTY

I.B.W.C. FILE NO.	ACREAGE	PREVIOUS OWNER	HOW ACQUIRED	FILING DATA OR SUIT INFORMATION
362	.251	Unknown Heirs of R.G.Warner	Condemned	U.S.Dis.Ct., W.Dis. Tex. #1890, Fin.Judg.11/2/39
365	1.052	Citizens Finance Co., et al	"	U.S.Dis.Ct., W.Dis.Tex. #1888, Fin.Judg.7/25/38
366	.020	" " "	"	
350	.576	Werthman Estate	Purchased	Recorded 4/4/39, Vol. 647, P.292
351	.154 .025	El Paso Brick Co.	"	Recorded 3/24/39, Vol. 648, P.239 & 241
352	.372	McNutt Oil & Ref. Co.	"	Recorded 10/19/37, Vol.624, P. 405
353	.971	J.A.Derrick	"	Recorded 8/18/37, Vol.624, P.318
357-A	2.190	ElPaso Elec. Co.	"	Recorded 6/2/38, Vol.632, P.383
358	11.299	SW Portland Cement Co.	"	Recorded 12/9/37, Vol.624, P.580
358-1	4.410	" " " "	"	Recorded 2/18/38, Vol.632, P.152
358-1A	.100	" " " "	"	Recorded 4/8/38, Vol.632, P.278
359	.630	Mauro Flores	"	Recorded 10/14/37, Vol.624, P.409
360	.590	Miguel Flores, et al	"	Recorded 10/20/37, Vol.624, P.411
361-Tr.2	.400	T & N O RR CO.	"	Recorded 3/17/39, Vol645, P.423
361-Trs.1 & 3	.471	" " " "	"	Recorded 2/27/39, Vol.645, P.423
361-Tr.4	.318	So. Pac. Co.	"	Recorded 3/17/39, Vol. 648, P.176
363	.198	C.C.Beardsley	"	Recorded 1/25/38, Vol.632, P.84
364	.382	S.M.Backer	"	Recorded 10/13/37 Vol.624, P.408
371	.181	County of El Paso	"	Recorded 1/10/41, Vol. 25, P.627

AMERICAN DAM SITE

301	--	ElPaso Brick Co.		New Mexico
302	1.828	SW Portland Cement	Purchased	Rec.12/8/36,Vol.617, P.304
303	.934	Kemp & Coldwell	"	Rec. 11/9/36, Vol.617, P.235

PROPERTY TO HEADWORKS AMERICAN CANAL.

1,000 cubic feet per second. In 1904 there were 135 days of zero flow, 108 days of 1 to 500 cubic feet per second, and 64 days of flow from 501 to 1,000 cubic feet per second. In 1905 there were 22 days of zero flow, 107 days of 1 to 500, and 93 days 501 to 1,000 cubic feet per second. In 1906 there were 12 days of zero flow, 43 days 1 to 500, and 99 days 501 to 1,000 cubic feet per second. In 1907 there were no days of zero flow, no days of 1 to 500, and 110 days of 501 to 1,000 cubic feet per second. In 1908 there were 34 days of zero flow, 46 days in which the flow was 1 to 500, and 143 days in which the flow was 501 to 1,000 cubic feet per second. In 1909 there were no days of zero flow, 34 days of 1 to 500, and 183 days 501 to 1,000 cubic feet per second. In 1910 there were 62 days of zero flow, 136 days of 1 to 500, and 45 days from 501 to 1,000 cubic feet per second. In 1911 there were no days of zero flow, 26 days of 1 to 500, and 114 days 501 to 1,000. In 1912 there were 17 days of zero flow, 105 days of 1 to 500, and 112 days of from 501 to 1,000 cubic feet per second. In 1913 there were 58 days of zero flow, 110 days of 1 to 500, and 113 days of 501 to 1,000 cubic feet per second. In 1914, there were no days of zero flow, 45 days of 1 to 500, and 144 days of 501 to 1,000 cubic feet per second.

The Court:

I will interrupt there. Mr. Marshall, we will recess the Court now until 1:45 p.m.

(At this time a recess was had from 12:00 o'clock noon until 1:45 P.M. the same day, at which time proceedings were resumed as follows):

Questions by Mr. Edwards:

Q. Just prior to the noon recess, Mr. Resch, I had asked you to state how much land a hundred second feet or a hundred second foot of water would irrigate, and after some mental calculations, I believe you stated a thousand acres. Was that what you said before noon?

A. Yes, I stated approximately a thousand acres. However, I have been thinking about that since adjournment, and on the basis of the summer flows at El Paso averaging approximately 1100 second feet, and considering that we are irrigating between fifty-five and fifty-six thousand acres in the El Paso Valley, then that figure would have to be revised upward to around approximately 5,000 acres.

Q. Five thousand acres?

A. Yes.

Q. Now, Mr. Resch, you were interpreting the graphs that you have before you and I don't believe you had completed it at the time we adjourned at noon. Will you pick it up where you left off?

A. In 1915 there were 129 days of zero flow, 108 days of 1 to 500, and 47 days 501 to 1,000 cubic feet per second. In 1916 there no days of zero flow, 47 days 1 to 500, and 101 days of 501 to 1,000 cubic feet per second. In 1917 there were 36 days of zero flow, 108 days 1 to 500, and 112 days 501 to 1,000 cubic feet per second. In 1918 there were 67 days of zero flow, 146 days 1 to 500, 96 days of 501 to 1,000 cubic feet per second. In 1919 there were 21 days of zero flow, 52 days of 1 to 500, and 134 days of 501 to 1,000 cubic feet per second. In 1920, 5 days of zero flow, 62 days of 1 to 500, and 137 days of 501 to 1,000 cubic feet per second. In 1921, no days of zero flow, 45 days of 1 to 500, 159 days of 501 to 1,000 cubic feet per second.

Mr. Grambling:
May it please the Court, may I ask one question. Is that thousand cubic feet, is that the outside limit, or do you mean that it is as much as that or more?

The Witness:
No, sir. That includes the figure one thousand.

Mr. Grambling:
It doesn't go any higher than that?

The Witness:
No, sir.

Mr. Grambling:
In no days did it go higher than that?

The Witness:
No, sir.

Mr. Grambling:
It just means within those limits?

The Witness:
That's right.

Mr. Grambling:
Thank you, sir.

A. (Continuing.) In 1922, 156 days of zero flow, 16 days of 1 to 500, and 60 days of 501 to 1,000 cubic feet per second. In 1923 there were 20 days zero flow, 60 days 1 to 500, and 91 days 501 to 1,000 cubic feet per second. 1924; 91 days zero flow, 69 days 1 to 500, 47 days 501 to 1,000 cubic feet per second. 1925, 45

days of zero flow, 119 days 1 to 500, and 147 days 501 to 1,000 cubic feet per second. 1926, 34 days zero flow, 115 days 1 to 500, and 109 days 501 to 1,000 cubic feet per second. 1927, zero days, there were no days of zero flow, 44 days 1 to 500, and 140 days 501 to 1,000 cubic feet per second. 1928, 105 days zero flow, 91 days 1 to 500, and 117 days 501 to 1,000 cubic feet per second. 1929, no days of zero flow, 71 days of from 1 to 500, 85 days 501 to 1,000 cubic feet per second. 1930, 39 days of zero flow, 96 days 1 to 500, and 117 days 501 to 1,000 cubic feet per second. 1931, 56 days of zero flow, 88 days 1 to 500, and 155 days 501 to 1,000 cubic feet per second. 1932, 7 days of zer oflow, 80 days 1 to 500, and 99 days 501 to 1,000 cubic feet per second. 1933, there were no days of zero flow, 80 days 1 to 500, and 99 days 501 to 1,000 cubic feet per second. 1934, 69 days zero flow, 148 from 1 to 500, and 122 days 500 to 1,000 cubic feet per second. 1935, there were no days zero flow, 157 days 1 to 500, and 148 days of 501 to 1,000 cubic feet per second. 1936, 10 days of zero flow, 91 days 1 to 501, and 154 days 501 to 1,000 cubic feet per second. 1937, no days of zero flow, 117 days 1 to 500, 83 days 501 to 1,000 cubic feet per second. 1938, no days of zero flow, 19 days 1 to 500, and 148 days 501 to 1,000 cubic feet per second. 1939, there were no days of zero flow, 178 days 1 to 500, and 115 days of 501 to 1,000 cubic feet per second. 1940, no days of zero flow, 165 days of 1 to 500, and 177 days of 501 to 1,000 cubic feet per second. 1941, no days of zero flow, 16 days 1 to 500, and 59 days 501 to 1,000 cubic feet per second. 1942, no days zero flow, 48 days 1 to 500, and 130 days 501 to 1,000 cubic feet per second 1943, no days zero flow, 183 days 1 to 500, and 144 days 501 to 1,000 cubic feet per second. 1944, no days zero flow, 90 days 1 to 500, and 175 days 501 to 1,000 cubic feet

per second. 1945, no days zero flow, 153 days 1 to 500, and 134 days 501 to 1,000 cubic feet per second. 1946, 45 days zero flow, 165 days 1 to 500 and 84 days 501 to 1,000 cubic feet per second. 1947 8 days zero flow, 203 days 1 to 500, and 85 days 501 to 1,000 cubic feet per second. 1948, no days zero flow, 159 days 1 to 500, and 103 days of 501 to 1,000 cubic feet per second. 1949, no days zero flow, 90 days 1 to 500, and 120 days 501 to 1,000 cubic feet per second. 1950, no days zero flow, 263 days 1 to 500, and 56 days 501 to 1,000 cubic feet per second. 1951, 26 days zero flow, 221 days 1 to 500, and 8 days 501 to 1,000 cubic feet per second.

Q. Now what does the final sheet show there, the bars on the final sheet?

A. The bars on the final graph entitled "The Rio Grande at San Marcial" represents the annual calendar year discharge in acre feet beginning in 1897 proceeding annually until October 31, 1951.

Q. Now, since the construction of Elephant Butte Dam, what is considered the normal release for the project from project waters stored in acre feet?

A. The normal—

Mr. Grambling:

Objection. We don't believe what is considered a normal release would be of any value to this Court. We think what is released normally would be, but what they consider is just an opinion. One man might think one thing and another man might think another.

Q. All right. I will change the form of the question. What has been your normal release on an average since construction of the dam when the water was adequate in storage?

A. The average release since storage first began in 1915 and extending through 1953 has been approximately 780,000 acre feet a year.

Q. Now, when the project was first initiated, of course, it wasn't fully developed, was it?

A. No, sir, that's true.

Q. You later on have some figures on the acreage as the project developed, and I will go into that somewhat later. Mr. Resch, what is the next check for storage for water south of Elephant Butte Dam?

A. The Rio Grande below the Caballo Dam—

Q. No. I mean below Elephant Butte. Caballo is what I had in mind. How far below Elephant Butte Dam is Caballo?

A. The dam itself measured along the old river is approximately twenty-seven miles.

Q. From the Elephant Butte Dam?

A. Yes, sir.

Q. Now below Caballo Dam and between there and El Paso are there any tributaries entering into the Rio Grande for the augmenting of the flow of the Rio Grande?

A. There are numerous arroyos.

Q. But there are no perennial streams?

A. No.

Q. And when you say "arroyo" you mean a dry gulch that runs water when they have a hard rain?

A. Yes, sir. If the rain is in sufficient quantity to produce a run-off.

Q. And what about that situation below the State line, that is, south of the New Mexico State line? What are there entering the Rio Grande by way of arroyos, or any other means of furnishing water to the stream?

A. From the Texas-New Mexico line?

Q. Yes.

A. At Anthony, which is approximately 18 or 19 miles above El Paso, and on the east side of the drainage, there are several short arroyos that infrequently carry some water.

Q. That is intermittently when there is a cloudburst or a rain, something of that sort?

A. Yes, sir, principally in the summer time.

Q. Mr. Resch, I will ask you whether or not you were personally present in September and October of 1952 when photographs were made from the northern extremity of the irrigation part of the Reclamation Project down to the southern extremity?

A. Yes, sir.

(At this point an instrument was marked for identification as Plaintiffs' Exhibit No. 38 and handed to opposing counsel for examination.)

Q. I will hand you a photograph marked Plaintiffs' Exhibit Number 38 and ask you whether or not that is a correct photograph of Elephant Butte Reservoir in October of 1952?

A. Yes, sir, that is a correct photograph.

Q. Mr. Resch, you will notice on the Butte over there (indicating) a white stripe up on the butte to a considerable distance. What does that indicate?

A. The highest white stripe represents the maximum elevation that Elephant Butte Reservoir has attained in its history.

Q. And the difference between the highest stage and where it is now shows the existing depletion of water at that time, that is, in October of 1952?

A. Yes, sir.

(Another photograph marked "Plaintiffs' Exhibit 39" and handed to opposing counsel for examination.)

Q. Mr. Resch, I hand you Plaintiffs' Exhibit No. 39, and I will ask you to state what that is?

A. This is a view of Elephant Butte Dam looking at it from the upstream side and taken from the east side.

Q. Is that a correct photograph of what it purports to represent?

A. Yes.

(Another photograph was marked "Plaintiffs' Exhibit 40" and shown to opposing counsel.)

Q. I hand you a photograph marked "Plaintiffs' Exhibit Number 40", and I will ask you to state what that is?

A. This is a view of the downstream side of Elephant Butte Dam.

Q. And is that a correct photograph of the downstream side?

A. It is.

(Another photograph was marked "Plaintiffs' Exhibit 41" and shown to opposing counsel.)

Q. Mr. Resch, I hand you a photograph marked "Plaintiffs' Exhibit 41" and I will ask you to state what that is?

A. This is a view of the east abutment of Elephant Butte Dam and the power plant from the downstream side on the east side.

Q. And does that correctly show that power plant from that view?

A. Yes, sir.

Q. Now, is that the power plant concerning which you have given testimony this morning, indicating where the power lines led to in various directions from the dam?

A. It is.

(Another photograph was marked "Plaintiffs' Exhibit 42" and shown to opposing counsel.)

Q. I hand you a photograph marked as Plaintiffs' Exhibit No. 42 and ask you to state what that is?

A. This is a view taken from the west side of the Rio Grande below Elephant Butte Dam, showing the spillway, the spillway chute, and a portion of the west abutment of Elephant Butte Dam.

Q. How many times has the water in the reservoir been high enough to run over this spillway?

A. Once.

Q. What year was that?

A. 1942.

Q. Does this photograph correctly show that spillway from the downstream side?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit No. 43" and shown to opposing counsel.)

Q. I show you a photograph marked Plaintiffs' Exhibit 43 and ask you what that is?

A. This is a view of Caballo Dam Reservoir taken from the west end of Caballo Dam.

Q. And does that correctly show the view from that point?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit No. 44 and shown to opposing counsel.)

Q. I now hand you a photograph marked as Plaintiffs' Exhibit 44 and ask you to state what that is?

A. This is a view of Caballo Dam downstream. That was taken from the east side of the river showing in the foreground the outlet from the spillway.

Q. And is that a correct photograph of that scene from that place?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit 45" and shown to opposing counsel.)

Q. Mr. Resch, I now hand you Plaintiffs' Exhibit No. 45 and ask you what that is?

A. This is a view of the spillway at Caballo Dam on the east side of the dam.

Q. Is that a correct photograph of what it purports to be?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit 46" and shown to opposing counsel.)

Q. I show you Plaintiffs' Exhibit Number 46 and ask you to state what that is?

A. This is the Arrey Canal heading looking upstream.

Q. Now with reference to Caballo where is Arrey? Is that shown on this map?

A. The Arrey Canal diverts from the Percha Diversion Dam, which is the uppermost diversion point of the Rio Grande. The diversion point is right here. (Indicating on map.)

Q. And does that correctly show what it purports to show?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit 47" and shown to opposing counsel.)

Q. I show you a photograph marked as Plaintiffs' Exhibit No. 47 and ask you what that shows?

A. This is a view of the Percha Diversion Dam with the sluiceway in the foreground and from the west side looking upstream.

Q. Now where is the Percha Diversion Dam?

A. The Percha Diversion Dam is approximately one hundred miles upstream from El Paso, or about three miles downstream from the Caballo Dam

Q. Does this photograph correctly show that structure?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit 48" and shown to opposing counsel.)

Q. I hand you a photograph marked as Plaintiffs' Exhibit No. 48 and ask you to state what that is?

A. This is a view of the Percha Diversion Dam looking upstream.

Q. Does that correctly show the dam from that position?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit No. 49" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 49, which is a photograph showing what?

A. This is a view of the bed of the Rio Grande taken from the Percha Diversion Dam looking upstream.

Q. Is that a correct view of the river from that point?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit No. 50" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 50 and ask you what that shows?

A. This is a view of the Leasburg Diversion Dam taken from the downstream side near the west end.

Q. And with reference to the Percha Dam where is the Leasburg Dam?

A. The Leasburg Dam is approximately forty miles downstream from the Percha Diversion Dam.

Q. All this is still in New Mexico, is it not?

A. Yes, sir.

Q. And this photograph correctly shows the scene that it purports to represent, does it not?

A. Yes, sir.

(And her photograph was then marked "Plaintiffs' Exhibit No. 51" and shown to opposing counsel.)

Q. I hand you a photograph marked as Plaintiffs' Exhibit No. 51 and ask you what that is?

A. This is a view of the Leasburg Canal and headgates looking downstream, the diversion point being on the east side of the Leasburg Diversion Dam.

Q. And does that correctly show the scene that it purports to indicate?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit No. 52" and shown to opposing counsel.)

Q. Mr. Resch, I hand you Plaintiffs' Exhibit 52—You have seen all these pictures since they were taken, have you not?

A. Yes, sir.

Q. And in order to avoid repeating the same question each time, do they all correctly show the scenes that they purport to be photographs of?

A. Yes, sir.

Q. I will ask you what Exhibit 52 is?

A. The sluiceway at the head of the Leasburg head gates at the Leasburg Diversion Dam.

(Another photograph was then marked "Plaintiffs' Exhibit No. 53" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit No. 53 and ask you to state what that is?

A. This is a view of the Mesilla Diversion Dam looking upstream.

Q. How far, approximately, upstream from the dam is that picture made, do you recall?

A. Several hundred feet.

Q. Is this water or sand that you see in the foreground?

A. No, sir; that is sand.

(Another photograph was then marked "Plaintiffs' Exhibit No. 54" and shown to opposing counsel.)

Q. Let me ask one other question. Where is the Mesilla Dam with reference to the ones that you testified to before this?

A. The Mesilla Diversion Dam is approximately twenty miles down the river from the Leasburg Diversion Dam and approximately thirty-nine miles up the river from El Paso.

Q. I hand you a photograph marked as Plaintiffs' Exhibit 54 and ask you what that shows?

A. This is a view of the Mesilla Diversion Dam looking downstream taken from the west side of the structure.

(Another photograph was then marked "Plaintiffs' Exhibit No 55" and shown to opposing counsel.)

Q. I hand you a photograph marked as Plaintiffs' Exhibit 55 and ask you what that is?

A. This is a view of the west side canal diversion works looking upstream, the diversion point being on the west end of the Mesilla Dam.

(Another photograph was then marked "Plaintiffs' Exhibit No. 56" and shown to opposing counsel.)

Q. I show you Plaintiffs' Exhibit Number 56 and ask you what that is?

A. This is a view of part of the Mesilla Dam looking upstream.

Q. Are the gates open there?

A. Three of the gates are open and one is down.

(Another photograph was then marked "Plaintiffs' Exhibit No. 57" and shown to opposing counsel.)

Q. I show you Plaintiffs' Exhibit Number 57, Mr. Resch, and ask you to state what that is?

A. This is a view looking across the roadway atop the Mesilla Diversion Dam taken from the west end of the structure.

(Another photograph was then marked "Plaintiffs' Exhibit No. 58" and shown to opposing counsel.)

Q. I show you Plaintiffs' Exhibit Number 58 and ask you what that is?

A. This is a view of the bed of the Rio Grande taken downstream from Mesilla Dam.

Q. Is that water or sand that you see there?

A. That is sand.

(Another photograph was then marked "Plaintiffs' Exhibit No. 59" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 59 and I will ask you what that is?

A. This is a view of the American Diversion Dam at El Paso taken from the east side of the structure immediately above the structure.

(Another photograph was then marked "Plaintiffs' Exhibit No. 60" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 60 and ask you what that is?

A. This is a view of the diversion into the American Canal on the left hand side of the picture, and a partial view of the American Diversion Dam on the right side of the picture taken from the upstream side.

(Another photograph was then marked "Plaintiffs' Exhibit No. 61" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 61. What is that?

A. This is a view of a part of the American Diversion Dam taken from the downstream side, the east bank.

(Another photograph was then marked "Plaintiffs' Exhibit No. 62" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit 62. State what that is.

A. This is a view of part of the American Diversion Dam taken from the downstream side, the structures in the foreground being the steel bridges of the Southern Pacific Railway.

(Another photograph was then marked "Plaintiffs' Exhibit No. 63" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 63. Will you state what that is?

A. This is a view of the American Canal immediately after diversion from the American Diversion Dam, taken from the downstream side, looking upstream.

Q. Now I believe this picture was made September 23, 1952. It shows some water in the canal there. What is that? Is that released water, return flow, or what?

A. No, sir. This is return flow water from project drains entering the river above El Paso.

(Another photograph was then marked "Plaintiffs' Exhibit No. 64" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit 64. What is shown there?

A. This is a view of the International Dam, commonly called the Mexican Dam. The Mexican diversion is made into the Acequia Madre on the extreme left, out of view of this picture, and the old Franklin heading is immediately on the right, out of view of the picture.

Q. Now with reference to the American Dam, which has just been introduced in evidence, where is this International Dam on the Rio Grande?

A. Approximately two or two and a half miles downstream.

(Another photograph was then marked "Plaintiffs' Exhibit No. 65" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 65. What does this photograph show?

A. This is a view of the Franklin Canal, looking downstream on the left side of the picture, showing the entrance of the American Canal into the Franklin Canal.

Q. Is that return flow water shown in here, too?

A. Yes, sir.

Q. When did you shut down releases from Elephant Butte in September of 1952?

A. If I remember correctly it was September the 12th that the gates were closed at the Caballo Dam.

Q. Mr. Resch, for the information of the Court, what is return flow water?

A. Return flow water is that water which is returned to the river from the project drains. It is water that has been applied as irrigation water and the drains are intercepting its flow through the ground profile.

Q. When water which has been released from Elephant Butte reservoir reaches the southern limits of the Rio Grande Project, if any of it gets there, how many times has it been used over, as indicated by your investigations, approximately?

A. As many as five times from the time it is released from Caballo Dam until it is used in the Tornillo District at the extreme southerly and easterly end of the project.

Q. It would have been used as many as five times?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit No. 66" and shown to opposing counsel.)

Q. I hand you a photograph marked as Plaintiffs' Exhibit 66 and ask you what that is?

A. This is a view looking up the American Canal from the point where it enters the Franklin Canal.

(Another photograph was then marked "Plaintiffs' Exhibit No. 67" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 67. This is a photograph of what?

A. A photograph of the upper end of the Franklin Canal on the left side of which is the weir over which water pours and goes into the lower Franklin Canal, and on the upper right-hand corner is shown the sluiceway structure to the river.

Q. Now what is the purpose of the sluiceway structure, and what is the purpose of the weir, and how do they operate?

A. The purpose of the weir was to prevent as much sand as possible from passing from the upper end of the canal down into the lower end of the canal down into the lower end of the canal. The canal The sluiceway was used to return this sand to the river. In addition, since the American Canal began operating in 1938, a portion of the water that the American Canal discharges into the Franklin Canal is returned to the Rio Grande from this sluiceway.

Q. And is it by means of the river bed that it passes on down to the Riverside heading below El Paso?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit No. 68" and shown to opposing counsel)

Q. I show you Plaintiffs' Exhibit Number 68, Mr. Resch. Where is the sluiceway below the American Dam?

A. The sluiceway is approximately two to two and a half miles below the American Dam.

Q. I hand you Exhibit Number 68. What is that?

A. This is a view of the sluiceway structure, particularly the operating equipment, at the lower end of the Franklin Canal Basin. In the foreground may be noted the bed of the Rio Grande. Correction. In the upper portion of the picture may be noted the bed of the Rio Grande.

Q. And in the foreground is what?

A. The foreground is in the Franklin Canal.

(Another photograph was then marked "Plaintiffs' Exhibit No. 69" and shown to opposing counsel.)

Q. I show you Plaintiffs' Exhibit 69. What is shown here?

A. This is a panoramic view of the upper end of the Franklin Canal. In the upper portion of the picture is noted the old Franklin Canal head works, which diverted directly from the Rio Grande. In the right portion of the picture is the skimming weir over which the waters flow into the lower canal. In the center and left portion of the picture is this sluiceway from the canal to the Rio Grande. In the lower right-hand corner is the Franklin Canal just below the upper portion of the canal.

Q. Mr. Resch, getting back to the sluiceway at the end of the American Canal, does it discharge into the river below the International Dam?

A. Yes, approximately one thousand feet.

(Another photograph was then marked "Plaintiffs' Exhibit No. 70" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 70. State what that is.

A. This is a view of the Riverside Canal heading and the Riverside structure looking downstream.

Q. Is that below the City of El Paso?

A. Yes, sir.

Q. How far approximately?

A. Approximately 17 miles below the American Dam.

(Another photograph was then marked "Plaintiffs' Exhibit No. 71" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit 71. What is that?

A. This is a view, looking upstream, of the Riverside Canal river structure.

Q. What lands are served by that canal?

A. The Riverside Canal serves approximately 28,000 to 29,000 acres of land lying in the San Elizario, Clint, and Fabens, and Tornillo area.

Q. Approximately how many acres does the Franklin Canal serve?

A. Approximately 28,020 to 29,000. The acreage under our system of operations is almost split 50-50.

Q. If the Franklin Canal heading were blocked or any stoppage of the Franklin Canal through the City of El Paso should take place, would the lands that are now served by the Franklin Canal have any other means of taking water from the river?

A. At the lower end of the canal, yes, sir.

Q. How far down, and where, and by what means?

A. The Franklin Canal is fed from the Riverside Canal approximately nineteen miles below El Paso.

Q. And between the City of El Paso and nineteen miles down there is no means of access to water from the river except through the Franklin Canal for those lands, is that right?

A. That is correct.

(Another photograph was then marked "Plaintiffs' Exhibit No. 72" and shown to opposing counsel.)

Q. I will ask you to examine Plaintiffs' Exhibit Number 72. What is that?

A. This is a view looking upstream into the headgate structure of the Riverside Canal.

(Another photograph was then marked "Plaintiffs' Exhibit No. 73 and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 73. What is that?

A. This is a view of the bed of the Rio Grande below the Riverside Canal river structure.

Q. Is that water or sand that is shown out there?

A. There are two small pools of water in the extreme right corner and center of the picture. The remainder is sand.

Q. You are referring to the lower right-hand corner; a pool there?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit No. 74" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit 74. What is that, Mr. Resch?

A. This is a picture of the Tornillo Canal Diversion. The canal structure is shown on the left part of the picture and the old waste structure is in the center. Formerly, this structure was located on the Rio Grande.

(Another photograph was then marked "Plaintiffs' Exhibit No. 75" and another marked "Plaintiffs' Exhibit No. 76" and both shown to opposing counsel.)

Q. I show you Plaintiffs' Exhibits Numbers 75 and 76. I show you Plaintiffs' Exhibit Number 75, and at the same time Plaintiffs' Exhibit 76. What are these two photographs?

A. These are pictures of the International Boundary and Water Commission's gauge shelter and measuring cable at the Rio Grande County Line Station.

Q. That is the first one, 75. That shows the general view of the entire structure, does it?

A. Yes, sir.

Q. And what is 76? Is that a close-up?

A. Seventy-six is a close-up of the staff gauge shown on the structure in the first picture.

Q. Now what is that gauge and what is its purpose?

A. Its purpose is to measure the elevation of the water in the river.

Q. Does the government have gauges similar to that all up and down the project on the river? I don't mean all up and down, but I mean in various locations?

A. Yes, sir.

Q. From the northern extremity to the southern?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit No. 77" and shown to opposing counsel.)

Q. I show you Plaintiffs' Exhibit Number 77 and ask you what that is?

A. This is a structure at the head of the Hudspeth County Conservation and Reclamation District's upper regulating reservoir. The picture is looking upstream through the Tornillo Canal wasteway.

Q. With reference to the southern limits of the Rio Grande Project where is this structure that is shown in Exhibit 77?

A. That structure is located at the southerly and easterly end of the Rio Grande Project.

(Another photograph was then marked "Plaintiffs' Exhibit No. 78" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 78 and ask you to explain what that is?

A. That is a picture of the International Boundary and Water Commission's gauging station at Fort Quitman, looking upstream, taken from the American side of the river.

Q. Now is this below the project limits?

A. Yes, sir.

Q. Now, Mr. Resch, on October 15, 1952 were some photographs also made upstream from the northern limits of the irrigation part of the Rio Grande Project, that is, north of Elephant Butte Reservoir?

A. Yes, sir.

(Another photograph was then marked "Plaintiffs' Exhibit No. 79" and shown to opposing counsel.)

Q. I will ask you to examine Plaintiffs' Exhibit 79 and tell me what that is.

A. This is a view of the Isleta Diversion Dam looking upstream. The diversion dam is approximately 11 miles downstream from Albuquerque, New Mexico.

Q. And about how far upstream from Elephant Butte Reservoir is it?

A. Approximately 140 miles.

Q. Now is this water or sand that you see there in the river bed?

A. That is sand.

Q. The figure of a man standing there on the river bed; who is that?

A. That is Mr. Louis A. Scott.

(Another photograph was then marked "Plaintiffs' Exhibit No. 80" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 80 and ask you to examine that and state what it is.

A. This is a view of the bed of the Rio Grande taken from the Isleta Diversion Dam. The picture was taken from the east side of the structure.

Q. And how far above Elephant Butte Reservoir is that?

A. Approximately 140 miles.

Q. Is that sand in the bed of the river there or water?

A. There are very few small pools of water. The majority of the picture shows sand.

(Another photograph was then marked "Plaintiffs' Exhibit No. 81" and shown to opposing counsel.)

Q. Mr. Resch, I show you Plaintiffs' Exhibit Number 81 and ask you what that is?

A. This is a view of the bed of the Rio Grande at the San Juan Diversion of the Middle Rio Grande Conservancy District.

Q. With reference to the northern end of the Elephant Butte Reservoir where is this?

A. The northern end of Elephant Butte Reservoir?

Q. Yes, sir. Upstream.

A. From the northern end of Elephant Butte Reservoir it is approximately 80 miles.

Q. Is this sand or water in the bed of the river there?

A. Most of it is sand. There is one small pool of water in the far distance.

(Another photograph was then marked "Plaintiffs' Exhibit No. 82" and shown to opposing counsel.)

Q. I hand you Plaintiffs' Exhibit Number 82. What is that?

A. This is a picture of the bed of the Rio Grande below the San Acacia Diversion Dam of the Middle Rio Grande Conservancy District.

Q. Where is the San Acacia Diversion Dam with reference to the northern end of the Elephant Butte Reservoir?

A. It is approximately fifty-five miles above the head of Elephant Butte Reservoir.

(Several photographs were then marked as Plaintiffs' Exhibits Nos. 83, 84, 85, 86 and 87, and shown to opposing counsel.)

Q. Mr. Resch, I ask you to examine photographs marked as Plaintiffs' Exhibits 83, 84, 85, 86 and 87 and ask you whether or not these are photographs which your office had made by one of your men on March 7th, 1952 and, if so, state what they are.

A. Yes, sir. These pictures were made at my direction. This picture is looking upstream from the Vado-La Mesa Bridge, which is approximately 28 miles above the American Diversion Dam.

Q. That is Number 83?

A. Yes, sir. This picture is looking downstream from the Mesilla Diversion Dam, approximately 39 miles above the American Diversion Dam. This picture is looking upstream to the Mesilla Diversion Dam in the background.

Q. That is 85; th elast one you mentioned?

A. Yes; this picture is looking downstream from the Picacho Bridge, or Highway 80 Bridge, west of Las Cruces, New Mexico, approximately 46 miles upstream from the American Diversion Dam. This picture is looking upstream to the Picacho Bridge.

Q. And the last one you referred to is Number 87?

A. Yes, sir.

Q. Now is there any water in the river bed at any of these locations, or is that just drifting sand?

A. There is very little, if any, water in any of these pictures.

(At this point all photographs heretofore mentioned and identified by Mr. Resch, being Plaintiffs' Exhibits Nos. 38 to 87, both inclusive, were admitted in evidence by the Court, but are not adapted to being copied into the record, and the originals thereof are to be transmitted under order of the trial Court to the Court of Appeals.)

Q. Mr. Resch, I will ask you to explain to the Court the method of operation of the Project, as far as irrigation is concerned, and the distribution of the waters which have been stored in project storage to the lands within the area served by the Project works?

A. The irrigation portion of the Project is divided into two operating divisions. The Las Cruces Division, with field headquarters at Las Cruces, New Mexico operates and maintains, and distributes water to the lands of the Project between El Paso and the Percha Diversion Dam. The El Paso Valley forms another operating division knows as the Ysleta Unit, with headquarters at Ysleta. The Project is divided for the purposes of water distribution into smaller units, commonly referred to as ditchrider districts, or ditchrider beats—

The Court:

Ditchrider what?

A. Ditchrider districts, or ditchrider beats. Above El Paso there are 28 ditchrider districts. Below El Paso there are eight ditchrider districts. The size of the district varies from as little as about 4,500 to as high as nearly 13,000 acres. The size of the district is controlled, to a great extent, by the number of water users and the number of turnouts to be served in the locality. The ditchriders report to a water master who immediately supervises their activities. The ditchriders, in serving the water users on their districts, twice each week, accept orders for water and in cases of undue high temperatures in the summer, or due to other climatic conditions, orders may be more frequently than twice a week. After the ditchrider obtains from the water user his request for water he, in turn, transmits that to his water master. The water master summarizes all of the ditchriders' requests and prepares an order to the Project Office in terms of so many cubic feet of water to be diverted at each of the diversion points in the Project. The Project Water Supply Engineer in the Project Office in El Paso further consolidates the orders coming in from the operating divisions and determines what the release from the reservoir must be. After this consolidation has been made, and the orders determined, the Water Supply Engineer then orders the dam tender to make the release of water at a certain time. The operating pattern that has been established through the years permits the headgate tenders at each of the diversion points to normally expect the arrival of the water at a certain time, and these time elements are then turned into actual diversions into the respective canals. The water users' initial orders were given for a certain day. The ditchrider then determines at what time of the day, or, if necessary,

the day following, or the day following, that the water will be available for the farmer, and he either personally contacts him, calls him by telephone or receives such communication from the water user himself. Then the ditchrider either opens the farmer's gate or he has advised the farmer that he may open his gate at a certain time. The farmer uses his order of water and by the time he is approaching the end of his requirement or use, he notifies the ditchrider by direct contact or by telephone that he will finish at a certain time. The ditchrider then arranges to pass the water to the next user who has an order of record. This type of an operation extending along approximately 120 miles of river means that there has to be a well functioning communications system from one end of the Project to the other, with the result that the Project pays for the installation and the rental on telephones in the homes of the ditchriders, as well as the storage dams and the diversion dams. The use of water at the present time is on 159,768 acres; That was the total irrigated area in the year 1953. Of that total, 56,027 acres, plus or minus, were irrigated in the El Paso Valley below El Paso.

The Court:

How many was that?

The Witness:

56,027, plus or minus, the remainder being irrigated above El Paso.

Mr. Grambling:

Your Honor, May I ask a question here. It seems like the witness uses synonymously "above El Paso" and "below El Paso". Does he mean that 56,027 acres

refers to the acreage irrigated in Elephant Butte, New Mexico?

The Witness:

No, sir. The 56,027 acres was irrigated in the El Paso Valley, which is the area of the Project below El Paso.

Mr. Grambling:

Does that include the plaintiff in this case, the El Paso County Water—

The Witness:

I was getting to that.

Mr. Grambling:

All right. Excuse me.

A. The irrigated acreage of the El Paso County Water Improvement District No. 1 in 1953 was 66,664 acres, plus or minus. Now, therefore, indicating that in 1953 there were only 10,637 acres of the El Paso County Water Improvement District Number One lands irrigated above El Paso.

Q. Mr. Resch, approximately how long does it take water to reach the American Dam at El Paso after it has been released from Cabalt reservoir?

A. During the early part of the irrigation season, when it is necessary to fill up the river bed, and so forth, it requires from three to four days depending, of course, on the amount of the release from storage. As we progress into the irrigation season, say in mid-summer, the arrival time at El Paso after release from Caballo is approximately sixty hours. From El Paso to the lower end of the Project requires an ad-

ditional 15 to 24 hours depending on the time of the year.

Q. Now, Mr Resch, what are the classifications of land within the Rio Grande Project?

Mr. Grambling:

Your Honor, we don't believe that that could be material to any issue in this case.

Mr. Edwards:

If the Court please, we want to show how the land got classified and who did it, and when it was done, and we have the data here on it, which we think certainly is admissible as a part of the method of operation of the Project to show Government control.

Mr. Grambling:

Well, we haven't objected to any part of this. He has gone into great length, but he certainly is getting far afield when he goes into classification of the land. I can't see by any stretch of the imagination how it could have any bearing on this particular suit here, or the issues involved. I don't know when we are going to end this suit if we are going to project into so many angles.

Mr. Edwards:

These issues are not immaterial at all. Under the Reclamation Act the Secretary of the interior has made certain classifications of the land and certain lands have prior rights over others, and what they are, and the notices given, and how it is done, and the effect of it, it is all a part of our case here to show that the Project is operated under the regulation of the Secretary of the Interior.

Mr. Grambling:

Now, Your Honor, there is no question here between the City of El Paso and the plaintiff in this case with reference to the characteristics of land for which they hold water rights. They put that in evidence, that 1400 acres, I believe, that have water rights, but that is not the issue in this law suit. That is not the issue involved at all.

Mr. Edwards:

Oh, yes, it is, in this respect: Your Texas Statutes provide that, as they relate to these reclamation projects, that the laws of Texas are subordinated to the Reclamation Act and to the rules and regulations and practices of the Secretary of the Interior under that Act, and I want to show that it is operating in such a manner. Texas law doesn't apply to it at all.

Mr. Grambling:

We certainly don't subscribe to the statement counsel just made. We think the Reclamation Law expressly provides that the acts of the Reclamation Department are subservient and dependent upon the laws of this State. We don't think there is any question about that.

Mr. Edwards:

Well, it is just the other way around, I think, when you finally get down to it.

The Court:

Well, I will admit the testimony.

(At this point an instrument was marked for identification as Plaintiffs' Exhibit No. 87a and handed to opposing counsel for examination.)

Q. Mr. Resch, I hand you a document marked "Plaintiffs Exhibit 87a and ask you what that is?

A. This is a tabulation showing the amount of acreage that was included in the Secretary of the Interior's notices to the irrigation districts of the Project. That is, as the project lands were provided with irrigation distribution facilities and drainage facilities, areas of the project became subject to begin the repayment of construction charges to the Government. The first such notice was given in 1920, but it was deferred until 1923 with the result that the first lands began the repayment of project construction costs in 1923.

The Court:

Well, now, does this finally get down to the classification you were talking about?

Mr. Edwards:

Yes, sir. We are coming to that.

Q. Go ahead.

A. The classification each year was made on the basis of the lands being subject to a repayment status. The classification means this: First, it had to be at least four feet to the ground water table below the surface of the land; it had to be subject to being served from the works constructed. The soil had to be of such nature that it would readily lend itself to irrigation and crop production. These determinations were being made on the lands of the Project between 1920 and 1937, and as the lands thus became subject to being classified as repayment lands, notices were given by the Secretary of the Interior to the irrigation districts, and beginning with the effective date of that notice the lands then were

said to be of water right status and subject to repayment of the construction charges.

Q. Now what is meant by suspended lands?

A. Suspended land is land on the Rio Grande Project that can be served from the existing irrigation and drainage system; but for which there are no water rights that can be alloted thereto.

Q. Now would lands be suspended; say for one year, or a period of several years; and then classified as water right land and vice versa?

A. That was true during the early periods of classification and to some extent in later years. The irrigation districts of the Project have approved the assignment of water rights to suspended lands.

Q. Now this exhibit which you have in your hand shows the original notices commencing in 1920 and carries on through 1953. In the second column there where you show, "Subject to Repayment of Construction Charges", the number of acres shows a variation from year to year? I believe that is correct, is it not?

A. That is correct

Q. And that is carried out under instructions promulgated by the Secretary of the Interior, the Bureau of Reclamation in Washington?

A. With this one difference. The final classification of the land by the Secretary of the Interior was made during 1936 and 1937.

Mr. Edwards:

We offer Plaintiffs' Exhibit No. 87a in evidence.

The Court:

All right.

(Plaintiffs' Exhibit 87a was thereupon received in evidence and photostatic copies of same appear on the following pages.)

(690)

Land subject to repayment of construction charges as reflected by Notices from the Secretary of the Interior to the Districts as provided in Contract dated June 15, 1918 with the Elephant Butte Irrigation District, and Contract dated December 29, 1917, with the El Paso County Water Users' Association and the El Paso County Water Improvement District No. 1, and subsequent contracts.

		Elephant Butte Irrigation District		El Paso County Water Improvement District No. 1			
		Date of Secretary's Notice	Subject to Repayment of Construction Charges Acres	Date of Secretary's Notice	Subject to Repayment of Construction Charges Acres		Total Project
1920	Original Notice	12-11-20	50,000	12-11-20	35,000		85,000
	Amended Notice	9-28-31	49,968	5-28-23	32,685	Revised Notice	82,653
1921	No change						
1922	No change						
1923	Original Notice		No change	5-28-23	45,101		95,101
	Amended Notice			7-31-24	44,997		94,965
1924	Original Notice	7-31-24	70,000	7-31-24	50,997		120,997
	Amended Notice	6-25-25	46,809	6-25-25	52,397		121,206
	Amended Notice	9-28-31	46,857				121,254
1925	Original Notice	6-25-25	77,689	6-25-25	60,300		138,389
	Amended Notice			12-31-25	55,900		133,589
1926	Original Notice	6-31-26	63,300	6-19-26	59,300		122,600
	Amended Notice	9-28-31	63,090				122,390
1927	Original Notice	9-22-27	63,500	9-22-27	58,000		121,500
	Amended Notice	9-28-31	63,345				121,345
1928	Original Notice	8-21-28	63,000	8-21-28	58,000		121,000
	Amended Notice	9-28-31	63,030				121,030
1929	Original Notice	9-23-29	63,500	9-18-29	59,000		122,500
1930	Original Notice	9-3-30	62,500	9-3-30	59,300		121,800
1931	Original Notice	9-3-31	63,300	9-18-31	58,000		121,300
1932	Original Notice	12-12-32	62,000	9-3-32	60,000		122,000
1933	Original Notice	10-3-33	60,600	10-3-33	60,000 *		120,600
1934	Original Notice	9-17-34	60,500	9-10-34	60,000 *		120,500
1935	Original Notice	9-13-35	60,000	9-16-35	59,000 *		119,000
1936	Original Notice	9-4-36	60,000	9-8-36	59,000 *		119,000
1937	and subsequent years, upon which computations and data for report as of 12-31-37 were [illegible]						

* Including 400 acres - Federal Subsistence Farm - No Water Rental

(p. 691)

"P-87a" (Second page)

Area shown as subject to repayment of construction charges on Annual Land Classification Report subsequent to Contracts of November 9, and November 10, 1937, which superseded Secretary's Notice.

	Elephant Butte Irrigation District	El Paso County Water Improvement District No. 1	Total Project
1937	90,192.64	69,006.15	159,198.79
1938	90,391.12	68,501.07	158,892.19
1939	90,590.41	68,428.63	159,019.04
1940	90,439.20	68,854.82	159,294.02
1941	89,986.00	68,974.65	158,960.65
1942	90,597.74	69,005.68	159,603.42
1943	90,088.20	68,993.68	159,081.88
1944	90,627.16	68,984.18	159,611.34
1945	90,628.07	68,976.88	159,604.95
1946	90,623.33	68,941.37	159,564.70
1947	90,616.53	68,930.94	159,547.47
1948	90,566.26	68,901.43	159,467.69
1949	90,585.69	68,880.88	159,466.57
1950	90,535.37	68,866.92	159,402.29
1951	90,622.98	68,870.01	159,492.99
1952	90,611.13	68,921.83	159,532.96
1953	90,587.07	68,917.54	159,504.61

(At this point an instrument was marked for identification as Plaintiffs' Exhibit 87b and handed to opposing counsel for examination.)

Q. I hand you Plaintiffs' Exhibit 87b and ask you whether or not this shows, from the records in your office, the Rio Grande Project acreage irrigated, broken down into Elephant Butte Irrigation District, El Paso County Water Improvement District Number One, and then the entire project; divided into suspended land and water right land, commencing with the year 1915 and extending through 1953?

A. Yes, sir, it does, with this explanation. That the early years 1915 through 1922 or '3, we are not certain that the figures given include all of the lands irrigated. It is quite possible that there were some community ditches that the Bureau had not taken over in those years that were still operating as community units.

Mr. Edwards:

We offer Plaintiffs' Exhibit 87b in evidence.

The Court:

That is 87b?

Mr. Edwards:

Yes, sir.

The Court:

All right.

(Plaintiffs' Exhibit No. 87b was thereupon received in evidence by the Court and a photostatic copy of same appears on the following page.)

(p. 693)

RIO GRANDE PROJECT

Acreage Irrigated

Year	Elephant Butte Irrigation District			El Paso County Water Improvement District No. 1			Rio Grande Project			
	Water-Right	Supersided	Total	Water-Right	Supersided	Total	Water-Right	Supersided	Total	
1915									33,876	a/
1916									62,513	a/
1917									64,388	a/
1918									64,781	a/
1919									70,013	a/
1920									73,366	a/
1921									68,451	a/
1922			43,116			41,104			84,220	a/
1923			52,415			39,771			92,186	a/
1924			59,394			56,598			115,992	
1925			67,458			63,453			130,911	
1926			77,444			65,099			142,543	
1927			74,042			63,511			137,553	
1928			77,662			65,442			143,104	
1929	75,324	451	78,775	56,615	8,807	65,422	131,939	12,838	144,777	
1930	72,947	6,402	78,449	58,900	7,258	66,158	130,847	13,640	144,487	
1931	72,182	7,033	79,215	56,843	8,232	65,075	129,025	15,365	144,390	
1932	72,616	6,686	79,302	52,035	6,112	58,147	124,651	12,798	137,449	
1933	72,884	6,673	79,557	54,085	5,564	59,649	126,969	12,537	139,506	
1934	64,502	7,883	72,385	52,324	4,383	56,707	116,826	12,864	129,690	
1935	63,365	2,060	65,425	52,539	2,111	54,650	115,904	4,171	120,075	
1936	71,253	7,190	78,443	55,233	5,126	60,359	126,486	12,316	138,802	
1937	78,874	2,919	81,793	62,351	867	63,218	141,225	3,786	145,011	
1938	75,861	2,376	78,237	58,579	538	59,117	134,440	2,914	137,354	
1939	76,245	2,288	78,533	60,284	1,150	61,434	136,529	3,438	139,967	
1940	77,759	2,620	80,379	61,437	1,295	62,732	139,196	3,915	143,111	
1941	80,806	3,138	83,944	62,439	1,447	63,916	143,245	4,615	147,860	
1942	83,003	3,479	86,482	63,333	1,744	65,076	146,335	5,223	151,558	
1943	84,155	3,880	88,035	63,285	2,622	65,907	147,440	6,502	153,942	
1944	84,676	3,440	88,116	63,138	3,048	66,186	147,814	6,488	154,302	
1945	84,960	3,754	88,714	63,080	3,041	66,041	147,980	6,779	154,759	
1946	85,499	4,600	90,099	63,412	3,388	66,800	148,971	7,988	156,959	
1947	85,608	5,221	90,829	63,717	3,565	67,282	149,325	8,786	158,111	
1948	84,751	4,410	89,161	63,454	3,193	66,647	148,205	7,603	155,808	
1949	85,733	5,968	91,701	63,787	3,636	67,423	149,520	9,604	159,124	
1950	85,180	6,341	91,521	63,462	3,800	67,262	148,642	10,141	158,783	
1951	84,638	5,991	90,629	62,715	3,617	66,332	147,353	9,608	156,961	
1952	85,242	6,897	92,139	62,790	3,583	66,373	148,032	10,480	158,512	
1953	86,026	7,078	93,104	63,171	3,493	66,664	149,197	10,971	159,768	

a/ May not include all acreage irrigated from Community Ditches having Private Headings on River.
b/ Includes Acreage irrigated by Island Extension, Hanson & Tornillo Community Ditches.

Acreage irrigated is either actual irrigated acreage or "net area in cultivation", the two expressions in individual years may vary by about 100 acres.

(At this point an instrument was marked for identification as Plaintiffs' Exhibit 87c and handed to opposing counsel for examination.)

Q. I hand you Plaintiffs' Exhibit Number 87c and ask you whether this shows, from the records in your office, the Rio Grande Project crop values for the years 1915 through 1953, broken down into Elephant Butte Irrigation District, and the El Paso County Water Improvement District Number One, and further broken down by the El Paso Valley below El Paso, the Mesilla Valley above El Paso, and the total for the Rio Grande Project?

A. That is true, with this explanation: That we have not been able to locate the records for some of the early years, and it is quite possible that there were community ditches operating that may not be included in these tables.

Q. Where records could not be located it was left blank in this tabulation, is that right?

A. Yes, sir.

Mr. Edwards:

We Offer 87c.

(Plaintiffs' Exhibit 87c was received in evidence but this exhibit has no bearing on points of appeal and is being omitted from the record.)

Q. Mr. Resch, has the City of El Paso, as a municipality, ever been a part of the Rio Grande Project?

A. No, sir, not to my knowledge.

Q. There has been offered in evidence, Mr. Resch, contracts between the United States of America and

the El Paso County Water Improvement District Number One, dated January 17, 1920, October 12, 1922, and November 10, 1937. You are familiar with all those contracts, are you not?

A. In a general way, yes, sir.

Q. You have the records of them in your office I believe?

A. Yes, sir.

Q. Has the District been operating under those contracts ever since they were signed?

A. Yes, sir.

The Court:

Are you somewhere near the close of your direct examination?

Mr. Edwards:

No, sir. I think it will be some little time yet.

The Court:

All right. Mr. Marshal, recess Court now for ten minutes.

(At this time a recess was had from 3:25 to 3:35 P.M. the same day, at which time proceedings were resumed as follows):

On Direct Examination Resumed.

Questions by Mr. Edwards:

Q. Mr. Resch, I refer you to the contract between the United States of America and the City of El Paso, and the El Paso County Water Improvement District Number One, dated February 18, 1941, which has been introduced in evidence as Plaintiffs' Exhibit

Number 27, and particularly to beginning with paragraph eight thereof, which reads: "City to provide Diversion Facilities. The City shall provide, without cost to the District or the United States, in such location and in accordance with such plans and specifications and construction practices as may be approved by the Project Superintendent, suitable facilities for diversion of water from the Rio Grande or the project works, and, without cost to the District or the United States, shall maintain the same in a condition satisfactory to the Project Superintendent, throughout the time during which the City may be entitled to receive water delivery hereunder" Did they do that?

A. Yes, sir.

Q. Then next is Section 9: "Delivery of Water to City 9(a). After completion of the City's diversion faciliti s and subject to the applicable provisions of the Reclamation Law and to compliance with the provisions of this contract, there shall be delivered, in each water year, to the City at the City's diversion facilities a quantity of water not to exceed the lesser of these amounts of water: (i) the quantity that can be used beneficially for municipal purposes, (ii) the total quantity which, in such water year, the acquired lands held by the City would have been entitled to receive from the project water supply had they been owned and held by private qualified landowners, (iii) an amount equivalent to three and one-half (3½) acre-feet of water per acre for each acre of acquired land held by the City in such water year." What has been the practice with reference to the delivery of water under that section 9(a) of the contract since it was entered into and performance undertaken?

A. With the exception of the years of water shortage in which it was necessary to allot the project

water supply, there was three and one-half acre feet per acre of the City's water right land available for diversion into the water treatment plant located on the brink of the Franklin Canal.

Q. And did they take that water through those facilities of the United States?

A. Yes, sir.

Q. You spoke of allotment of water. When was the first year when it was necessary to make an allotment?

A. 1951 was the first year in which we had to go through the entire irrigation season under water allotment.

Q. What was the allotment for that year?

A. One and three-fourths acre feet per acre to the project water right lands.

Q. And prior to that time, when the supply in project storage was adequate, how much had been delivered approximately?

A. Three and one-half acre feet per acre.

Q. And the three and one-half acre feet is what the City got at that time?

A. Yes, sir.

Q. When the water right lands were necessarily placed on allotment how much did the City get?

A. The City received the same allotment as any other water right lands of the project. In 1951, 1-3/4 acre feet per acre. In 1952, 2½ acre feet per acre. In 1953, 1-9/10 acre feet per acre, and in 1954, one-half foot per acre.

Q. When the supply of water became critically low several years ago what, if anything, was done by the farmers within the project in an effort to save themselves by sinking wells?

A. Beginning in the fall and winter of 1950 it was apparent that project storage was in a critically low stage. As a result the farmers throughout the project began to drill irrigation wells on their farms, for which they paid, in order to supplement the water supply that would be available from project storage the next year.

Q. Do you know what the average cost per well with the equipment is?

A. Approximately $7,500.

Q. And how many wells, according to your records, were sunk on the property of the individuals owning land within the area served by the Rio Grande Project?

A. About 1301 irrigation wells at our last count, which was taken several months ago.

Q. How much water is in project storage now, and by project storage I mean the combined storage in Elephant Butte Reservoir and Caballo Reservoir?

A. About 94,000 acre feet in both reservoirs.

Q. How much was there this time last year approximately?

A. Approximately 100,000 acre feet.

Q. And in the year before that?

A I hesitate to give this figure, but I will offer it as an estimate. We probably had around 350,000 acre feet.

Q. What is the capacity of the Elephant Butte Reservoir at this time?

A. At this time the capacity of Elephant Butte Reservoir is about 2,100,000 acre feet.

Q. And what is the capacity of the Cabalo Reservoir?

A. At the present time about 340,000 acre feet.

Q. Getting back to this contract of February 18, 1941, and particularly paragraph 10e, which reads and provides: "No water shall be delivered to acquired lands while the legal and equitable title thereto remains in the City or to any acquired land in any water year when such land was included in the computation of the advance estimated charge or the actual charge for such water year:

Provided, That subject to the compliance by the City with the provisions of this contract, including the provisions of Article 11 relating to the payments to be made to the United States, until the City's diversion works and appurtenant structures are completed and in actual operation water may be delivered to not to exceed one hundred and sixty acres of such acquired land in the same manner and under the terms and conditions, not in conflict with the provisions of this contract, as if said lands were in private ownership of a qualified project landowner." Was that paragraph complied with by both sides?

A. Yes, sir. Several instances were found in which renters for grazing purposes of the City land had, in an unauthorized manner, applied water thereto and the officials of the City Water Department were very helpful in clearing up those cases.

Q. Referring to Paragraphs 11 and 12, relating to terms of payment providing that the City should pay, I believe, to the United States the various amounts therein set out. Was that done by the City?

A. Yes, sir.

Q. Up until the time the present administration took a different view of the situation, is that right?

A. Under the present contract the City does not pay the United States directly.

Q. But they paid the United States under this contract as long as they were operating under this contract?

A. Yes, sir.

Q. Section 15 relates to the measurement of water and provides: "Before delivery of water to the City under the provisions of this contract, the City shall, without cost to the United States or to the District, construct in a manner, at a location at the point of delivery of water to the City, in accordance with such plans and specifications as hereafter shall have been approved by the Project Superintendent, an adequate measuring device for the measurement of water delivered to the City under the provisions of this contract;—" Did they do so?

A. Yes, sir.

Q. ". . . and the City shall maintain said measuring device in a condition satisfactory to the Project Superintendent." Did they do that?

A. Yes, sir.

Q. "The water which may be delivered to the City pursuant to this contract will be measured by the United States, and such measurements shall control for all purposes of this contract." Was that carried out?

A. Yes, sir.

Q. I now refer you to the contract of December 1, 1944—

The Court:

What exhibit is that?

Mr. Edwards:

That is Exhibit 29

Q. I refer you to Paragraph 7; "The City shall provide without cost to either of said Districts . . ." and so forth. Under this contract there was a similar provision providing for suitable facilities for the diversion of waters of the Rio Grande, the same as—it was similar to the one in 1941?

A. Yes, sir.

Q. And that was done, wasn't it?

A. Yes, sir.

Q. And Sections 8a and 8b: "8.(a) After the completion of the City's diversion facilities and subject to the applicable provisions of the Reclamation Law and in compliance with the provisions of this contract, there shall be delivered, in each water year, to the City at the City's diversion facilities a quantity of water not to exceed the lesser of these amounts of water . . ." and then it sets out the same amounts as they were in the 1941 contract, is that right?

A. Yes, sir.

Q. And that was carried out also?

A. Yes, sir.

Q. And then Section "b" provided: "The water so to be delivered will be delivered upon request of the City's Superintendent in accordance with such detailed schedule of delivery as may be agreed on from time to time between the Project Superintendent and th City's Superintendent." Now, was that delivery made pursuant to agreement between your office and the City Superintendent?

A. Yes, sir. We had an understanding with the operating officials of the City Water Department.

Q. And Section 13, as in the 1941 contract, provided that the City should furnish the means of

measuring the water, similar to what was in the 1941 contract. And that was done also?

A. Yes, sir.

Q. Mr. Resch, pursuant to the contracts of '41 and '44, providing for the acquisition of water right land by the City of El Paso, do you know how much land the City acquired; water right land?

A. 1,659 acres, plus or minus.

Q. 1,669?

A. 1,659.

Q. 1,659, plus or minus?

A. Yes, sir.

Q. Now, Mr. Resch, has the City taken, for municipal purposes, through the water treatment plant, project water which otherwise would have been used on project land?

Mr. Grambling:

That calls for a conclusion, your Honor.

Mr. Edwards:

I think he knows whether it has been used for that or not.

The Court:

Well, I think it would be best to find out for sure that he knows.

Q. All right. I will reframe the question. I will put it this way: Was there Rio Grande Project water, which otherwise would have been delivered to said lands for irrigation purposes, diverted and used in the City water treatment plant for municipal purposes?

Mr. Grambling:

Now, Your Honor, that is an assumption in the first place, as to what is project water. What do they mean by project water? How can this witness say that project water was diverted?

The Court:

The Court overrules the objection.

Mr. Grambling:

We don't think he has been shown to be qualified, and that calls for a conclusion on his part.

The Court:

Overruled.

A. The City used in excess of their allotment.

The Court:

Now, wait a minute.

Q. The question was did they take water which otherwise would have been used for irrigation purposes on that water right land and use it for municipal purposes? I don't think maybe you understand my question.

A. No, sir. I am confused.

Q. The City came in and bought, as you say, 1,659 acres of water right land. Now if the City had not bought those water right lands would the water, to which those water right lands were entitled, have been delivered to them for irrigation purposes?

A. Yes, sir.

Q. All right. Did the City take that water, which otherwise would have been delivered to that land for

irrigation purposes, and use it for municipal purposes?

A. Yes, sir.

Mr. Grambling:

Now that relates, as I understand it, to 1,659 acres?

Mr. Edwards:

That is right.

The Court:

Yes.

Q. Now, Mr. Resch, I wish that you would describe what was originally known as the old irrigation canal, now known as the Franklin Canal, as it is now constructed.

A. The Franklin Canal, as we now know it, was originally constructed in 1889.

Mr. Sims:

If the Court please, may we ask the witness in that connection whether he was here at that time. He has been asked whether he can describe it as of that time.

Mr. Edwards:

I am asking him according to his records.

The Court:

What do you rely on for such testimony?

The Witness:

Records in our office.

The Court:
Which records?

The Witness:
The copies of the filings that were made by a group of citizens in El Paso with the County Clerk of El Paso County, giving notice of appropriation of water to be used in the canal that was to be constructed from El Paso to Fabens.

The Court:
Are you talking about some instrument that is in evidence here?

Mr. Edwards:
It is in evidence, Your Honor, yes. That is, not the copy that is in his office, but a certified copy is in evidence.

Mr. Sims:
If he restricts his testimony to something that is in evidence we don't see the necessity of the repetition.

Mr. Edwards:
I am asking him to describe the condition of the old canal.

Mr. Sims:
He don't know that of his own knowledge.

The Witness:
I wasn't down here at the time.

The Court:
Well, I don't think it shows the competency to testify beyond the date that might have been the be-

ginning date of the canal. I believe he will just have to repeat record evidence in that respect.

Q. I hand you a map, which is marked "Plaintiffs' Exhibit 106a" (Reporter marks same), and ask you whether it was prepared from your office, from data on file in your office, as part of the records in your office?

A. Yes, it was.

Q. What is it?

A. This is a general map showing the area, Anthony to El Paso, on which is shown the principal features, the river, the main canals, main drains, the City of El Paso Canutillo site, and indication as to the location of the El Paso water treatment plant, and river pumping station, the location of the El Paso sewer outfall, and the El Paso sewage disposal plant.

Q. And what is this? (Indicating.)

A. And the Franklin Canal through the City of El Paso.

Mr. Sims:

The structures which he mentioned, is that as of now?

The Witness:

As of the date of the map.

Mr. Sims:

As of the date of the map?

The Witness:

Yes, sir.

The Court:

Now, does that supplement in any way Exhibit Number 35?

Mr. Edwards:

No, sir. Thirty-five is a map showing the boundaries of the El Paso County Water Improvement District Number One. This perhaps includes some of that, but is on a larger scale and shows matters which are not adequately shown on Exhibit 35.

The Court:

Well, this Exhibit 35 shows very clearly the Franklin Canal, the course and the location.

Mr. Grambling:

We have no objection.

The Court:

All right.

(The map in question, being Plaintiffs' Exhibit 106a was thereupon received in evidence by the Court, and a photostatic copy of same appears on the following page):

Note

Page 708 is on Card 16.

Q. Now, Mr. Resch, on the left-hand side of this map, in red, it indicates the position of the city owned land in the Canutillo well site, is that right?

A. Yes, sir.

Q. How far is the Canutillo well site upstream from the water treatment plant, which is shown on the right-hand side of the picture?

A. Sixteen and seven-tenths miles, plus or minus.

Q. And have you made any effort to determine the approximate loss in the carriage of water over that stretch of 16 miles or more from the well site to the water treatment plant?

A. One of our more recent determinations reflected a loss of 99 percent from the Canutillo well site to the El Paso Electric Plant, which is on the bank of the river approximately a mile and a half or two miles above the American Dam.

Q. So that that loss occurred a number of miles before the water would have gotten to the treatment plant, is that right?

A. Yes, sir.

Q. And on a larger scale here it shows the Franklin Canal where it takes out frim the American Canal, and then through the City of El Paso, and down the valley, is that right?

A. Yes, sir.

Q. Now, Mr. Resch, who operates the American Dam?

A. The International Boundary and Water Commission, American Section, operates the American Dam.

Q. And what is their method of operation as relates to supplying the Franklin Canal with the requirements of the Franklin Canal?

A. They follow our desires and wishes with respect to the amount of water that is to be diverted in the American Canal.

Q. That is, if I understand you correctly from your previous testimony, you have described how it is determined how much water the farmers down the valley need, and that is reported to your office, and necessary releases are made from project storage up in New Mexico, and that comes on down the river to the American Dam, and then you arrange with the American Section of the International Boundary Commission for the delivery of that water into the All American Canal, is that right?

A. Yes, sir, except for the Mexican Treaty water, which the International Boundary and Water Commission measures into the bed of the river below the American Dam.

Q. Well, the Mexican Treaty water has priority over everything, but the Franklin Canal needs are supplied through the American Canal by the American Section of the International Boundary Commission in cooperation with you as the manager of the Project?

A. Yes, sir.

Q. What is the carrying capacity of the Franklin Canal as now constructed?

A. The designed capacity is about 430 cubic feet per second.

Q. Do your records show when the Government increased or enlarged the Franklin Canal?

A. After purchase of the Franklin Canal by the United States in 1912, a program of reconstruction was undertaken, beginning in 1914 and extending into 1915. The canal was enlarged, improved, new structures provided between El Paso and Fabens, Texas,

and an enlargement of the head works, that is, the diversion works from the river, was made in 1921.

Q. How long do your records show that the Franklin Canal has been continuously used by the United States Government?

A. Our first diversion record in the Franklin Canal under government operation was in 1913.

Q. And has it been continuously used since that date?

A. Yes, sir.

Q. Did you state before noon approximately how many acres were served by the Franklin Canal?

A. Between 28,000 and 29,000 acres.

Q. Do you recall the evidence with reference to the expenditure of $56,000 by the United States of America for the fencing of the Franklin Canal through the City of El Paso, and the record shows that there was some delay in getting this quitclaim deed, or the Government wouldn't take the quitclaim deed until certain provisions were put in it. Do you know whether the Government did spend these funds in the erection of a fence along the canal in the City of El Paso?

A. Yes, sir. The fence was so constructed.

Q. Now, Mr. Resch, when did the United States construct the Canutillo lateral wasteway?

A. During the season of 1924-25.

Q. And where is the Canutillo lateral wasteway?

A. The Canutillo lateral wasteway is approximately 16-7/10 miles above the American Dam.

Q. What is its relation to the Vinton River Lateral with reference to proximity?

A. The Vinton river Lateral wastes to the river above the point where the Canutillo lateral wastes to the river.

Q. And when did the Government construct the Vinton River Lateral?

A. The Canutillo river Lateral was constructed during—

Q. No, the Vinton River Lateral.

A. The Vinton river Lateral was constructed during the season of 1936-1937.

Q. And when was the Vinton River Drain constructed?

A. The Vinton River Drain was constructed, I think, during the winter of 1939 and 1940.

Q. And have these facilities been continuously operated by the United States since their construction?

A. Yes, sir.

Q. Have those facilities, including the Franklin Canal, been used by the City for transportation of any of its water?

A. Yes, sir.

Q. Has your office made an effort to have the City accept a license for the use of those government facilities in order to legalize their use?

A. Yes, sir.

Q. Has the City been willing to accept such a license, or have they done so up to the present time?

A. They have not done so up to the present time.

Q. Are they discharging the wells that they drill at the Canutillo well site by flowing into the Canutillo wasteway and the Vinton lateral and Vinton drain, and then down the river to the treatment plant?

A. Of their six wells in the Canutillo site several of them use the facilities, yes, sir.

Q. And, as I understand your testimony, up to the present time they have never secured that authority from the Government?

A. That is correct.

Q. Mr. Resch, I think the claim has been made by the defendant—I am not sure it is in their pleadings, but in their brief I think—that the Government had made some kind of a demand on the City for the use of the river bed. Is there any such demand as that ever been made for th transportation of their water?

Mr. Grambling:

All he could say was that he demanded or any demand he made. He couldn't know what the Government demanded.

Mr. Edwards:

If any demand was made it would be through his office.

Q. Did you or your office ever make any demand to the City for the use of the river bed, including Canutillo well site to the treatment plant?

A. Not to my knowledge.

Q. Now, Mr. Resch, referring to the contract of August 10, 1949, between the City and the District, and approved by the United States, with particular reference to Section 1 thereof, which provides: "The District, subject to approval hereof by the Secretary of the Interior of the United States, will permit use by the City of Rio Grande Project works serving the District lands, for the purpose of this agreement, to the extent, in the manner, and at such points, as will not interfere with the operation and use of such works for the benefit of the District and its lands, all as determined by the Project Manager." Now you are familiar with that contract of August 10, 1949, are you, Mr. Resch?

A. Yes, sir.

Q. And pursuant to that paragraph one of that contract, after its execution, did the City make use of the facilities there described with the cooperation of the Project Manager?

A. Yes, sir.

Q. Section 2 of that contract provides: "At such times and to the extent there may be storm, return flow, and unavoidable operating waste waters in the Rio Grande or in the Project works serving the District, at points available for diversion by the City and in excess of the requirements of the District and the Hudspeth District, the City may divert and use all or any part of such waters for domestic and municipal purposes by the City." Now, that was done up to the time that the present city administration declined o go along?

A. The City had made use of the return flow water in the Franklin Canal.

Q. And had they done so pursuant to the determinations and accepted the judgment of the Project Manager as to whether there was water available?

A. It was done with our full knowledge under that contract, yes.

Q. Now Section 3: "The determination of availability of such waters as to time, points of availability, and quantity, and the requirements of said two districts from time to time, shall be made by said Project Manager, whose decision shall be final; and the diversion and use of such waters by the City shall be confined to and in conformity with such determination." Was that paragraph lived up to up until the time that the present administration said the contract was all void?

A. As far as I can remember it was, yes.

Q. Section 5 provides: "The City shall cause accurate records to be kept of the diversion and use of waters covered by this agreement, and shall upon request supply the Project Manager or the District with complete and correct copies of such records." Was that done?

A. Yes, sir.

Q. Mr. Resch, since the advent of the present city administration have you had considerable correspondence with Mr. Harlan Hugg, the General Manager of the Department of Water and Sewage of the City of El Paso with reference to the City's activities and usage of project facilities and the matter of excessive use of water?

A. Yes, sir.

Q. I will hand you two letters dated September 12, 1952, which are marked "Plaintiffs' Exhibit No. 88 and 89" (Reporter marks same), and ask you if they were mailed by you to Mr. Hugg?

A. Yes, sir.

(Mr. Edwards shows same to opposing counsel.)

Mr. Grambling:

Your Honor, we feel that these letters are simply repetitious and self-serving and should not be admitted.

Mr. Edwards:

The correspondence will show that the Bureau of Reclamation was endeavoring to carry out the terms of these contracts and will show where divergence between the Bureau of Reclamation and the City took place to where it finally reached the point where they have refused entirely to comply with the contracts.

and we think the correspondence is admissible for that purpose.

The Court:

Let me look at those. I won't try to read it all.

(The exhibits were then handed to the Court.)

The Court:

I will overrule the objection.

Mr. Grambling:

Your Honor, I would like to call your attention to one thing. Those letters were written right on the eve of the law suit and will simply bolster their position in the law suit. You will notice copies were sent to the attorneys who prosecute the action.

Mr. Edwards:

We were trying to get together on the contracts and make you live up to them.

Mr. Grambling:

That shows the purpose of it; that it was to bolster their position.

The Court:

Well, that just may be a matter of consequence perhaps in evaluating the significance of the letters. The two that I read there—who was it that wrote those first two letters?

Mr. Edwards:

Mr. Resch the gentleman on the stand.

The Court:

Yes. And the reply to it I don't think would come within the point you just made. Now as the parties go along it may get down to just where it is obvious that an effort is being made to solidify a contention for purposes of litigation.

(Plaintiffs' Exhibits Numbers 88 and 89, which were then read by Mr. Edwards, were admitted in evidence by the Court, and same read in words and figures as follows):

"P-88".

United States
Department of the Interior
Bureau of Reclamation
mgr
211 Federal Building
El Paso, Texas

September 12, 1952

Mr. Harlan Hugg, General Manager
Department of Water and Sewerage
City of El Paso
El Paso, Texas

Dear Mr. Hugg:

Due to the shortage of water on the Rio Grande Project resulting from severe drouth conditions, and the necessity of having operated under water allotments during 1951 and 1952, the return flow water available is considerably below normal. Accordingly it is necessary to allocate the return flow water to

the City in accordance with Article 3 of contract dated August 10, 1949, between the City of El Paso and El Paso County Water Improvement District No. 1.

It has been determined at this time, as provided in the August 10, 1949 contract, that there is available for use by the City of El Paso ten cubic feet per second of Project return flow water. Additional determinations of availability will be required from time to time as the return flow available diminishes in volume.

The return flow determined as available to the City may be diverted by the City from the Franklin Canal, or the Rio Grande, in accordance with the "1952 Fall and Winter Water Schedule for El Paso Valley", copies of which have been forwarded to you under separate letter dated September 12, 1952.

Sincerely yours,

W. F. RESCH,
Project Manager

Blind to: Regional Director
Regional Counsel
N. B. Phillips
Louis A. Scott
Eugene T. Edwards

"P-89"

United States
Department of the Interior
Bureau of Reclamation

211 Federal Building
El Paso, Texas

September 12, 1952

Mr. Harlan Hugg, General Manager
Department of Water and Sewerage
City of El Paso
El Paso, Texas

Dear Mr. Hugg:

Enclosed for your information are four copies of the "1952 Fall and Winter Water Schedule for El Paso Valley". The schedule indicates the dates water will be in the various canals of the El Paso Valley. Of particular interest to you will be the dates shown for the Upper and Lower Franklin Canal. During the period shown for the Upper and Lower Franklin Canal water will be in the section of the Franklin Canal from which the City of El Paso Water Treatment Plant diverts water. On the date shown for the Riverside, San Elizario, Island-Hansen and Tornillo ditches water will not be in that section of the Franklin Canal from which the City Water Treatment Plant diverts water.

During the periods water is not being diverted into the Franklin Canal the flow will be in the Rio Grande. As frequent shifts between the river and the canal will be required, as set forth in the schedule the

Water Treatment Plant Superintendent will be given at least 24 hours notice of such changes.

Sincerely yours,
W. F. RESCH,
Project Manager.

Enclosures 4
Blind to: Regional Director
Regional Counsel
N. B. Phillips
Louis A. Scott
Eugene T. Edwards

(At this point another letter was marked "Plaintiff's Exhibit No. 90" and shown to opposing counsel.)

Mr. Edwards:

And then Mr. Hugg's reply, which is Plaintiffs' Exhibit 90.

(Plaintiffs' Exhibit No. 90, which was then read by Mr. Edwards, was admitted in evidence by the Court and same reads in words and figures as follows):

"P-90".

(Seal—The City
of El Paso, Texas)

Public Service Board
Municipal Water and Sewer System
419 North Stanton St. El Paso,
Texas P. O. Box 511

September 16, 1952

Mr. W. F. Resch, Project Manager
Bureau of Reclamation
211 Federal Building
El Paso, Texas

Dear Mr. Resch:

I appreciate your letter of September 12th, regarding the flow of water in the Canal and the River. I am not sure that I understand the ten cubic feet per second of Project return flow water that is to be available to the City of El Paso, to be removed at our intake to the Treatment Plant; unless it means that this is in addition to the 14.7 cubic feet of water that we now put into the stream at Canutillo and are removing at our Treatment Plant; and in addition to the 18.6 of water which we are putting into the River at our present discharge line to the River and remove at the intake plant in an equal amount.

If this is what is meant, then this would give us a total of 43.3 cubic feet per second of water allowable at the intake; which I would consider is probably satisfactory at the present time.

Trusting that this ten cubic feet that you referred to is the actual allowable for the City of El Paso in

addition to the water that we provide for ourselves, I am

Yours very truly,
PUBLIC SERVICE BOARD,
Municipal Water and Sewer System,
(S.) HARLAN H. HUGG,
(Harlan H. Hugg),
General Manager.

HHH:dm

Mr. Edwards:
Number 91 happens to be a letter from Mr. Phillips, Manager, to Mr Harlan Hugg. (To Mr. Grambling): We ask you to produce the original of this letter.

Mr. Grambling:
You can use the copy.

(Same was marked "Plaintiffs' Exhibit No. 91" and having been received in evidence, reads in words and figures as follows):

"P-91".

September 16, 1953

Mr. Harlan Hugg, General Manager
Department of Water and Sewage
City of El Paso,
El Paso, Texas

Dear Mr. Hugg:
This office is in receipt of copies of two letters written to you by Mr. W. F. Resch, Project Manager.

Bureau of Reclamation under date of August 12, 1952 advising you of the 1952 Fall and Winter water schedule, and indicating the amount of water being made available to the City of El Paso from return flow, in accordance with Article 3 of the Contract dated August 10, 1949 between the City of El Paso and this District.

We wish at this time to call your attention to a delinquent bill in the amount of $2632.59 including interest to date for return flow water furnished in the fall and winter of 1951-52. We will expect payment of this account before any return flow water is taken by the City, under the terms of the Contract of August 10, 1949; and desire payments due in the future to be made as provided for by said contract.

Your early consideration of this matter will be appreciate.

Very truly yours,
N. B. PHILLIPS,
Manager.

NBP-mjw
copies to
W. F. Resch
Louis A. Scott
Eugene Edwards

(The above exhibit was then read by Mr. Edwards.)

Mr. Sims:

Does it show carbon copies to you and Mr. Scott? You didn't read that.

Mr. Edwards:

It shows—well, you want the stenographer's initials too?

Mr. Sims:

Whatever the exhibit shows.

Mr. Edwards:

It shows "NBP-mjw, copies to W. F. Resch, Louis A. Scott and Eugene Edwards."

(At this point another letter, consisting of two pages, was marked for identification as Plaintiffs' Exhibit 92 and shown to opposing counsel.)

The Court:

Now who is this from?

Mr. Edwards:

This is from Mr. W. F. Resch, Project Manager, in reply to Mr. Hugg's letter of September 16th.

(Plaintiffs' Exhibit No. 92, which was then read by Mr. Edwards, was received in evidence by the Court, and reads in words and figures as follows):

"P-92"

United States
Department of the Interior
Bureau of Reclamation

211 Federal Building
El Paso, Texas

September 23, 1952

Mr. Harlan H. Hugg, General Manager
Public Service Board
Municipal Water and Sewer System
P. O. Box 511
El Paso, Texas

Dear Mr. Hugg:

Thank you for your reply of September 16, 1952 to my two letters to you dated September 12, 1952.

The ten cubic feet per second of the Project return flow water determined as available for use by the City under Article 3 of Contract dated August 10, 1949, between the City of El Paso and El Paso County Water Improvement District No. 1 in my September 12, 1952 letter does not include any water which the City may pump into the Rio Grande at Canutillo and subsequently divert, after allowance for conveyance loss in the river channel, into the City Water Treatment Plant at El Paso.

It is expected, however, that the City will sign a license for use of Project facilities in the Canutillo area which convey the water pumped from City wells

to the Rio Grande, and for use of the Project Franklin Canal at El Paso for the conveyance and diversion to the City Water Treatment Plant. Forms of license for this purpose, including language changes requested by representatives of the City, were transmitted by letter to Mr. A. R. Grambling, Attorney, on August 1, 1952. To date, we have not been advised which license form the City desires to use.

The latter part of paragraph one of your letter which reads: "—and in addition to the 18.6' of water which we are putting into the River at our present discharge line to the River and remove at the intake plant in an equal amount." may refer to the discharge of sewage effluent to the Rio Grande at a point approximately 3.1 miles down river from the City Water Treatment Plant. If this is what you have in mind, may I respectfully invite your attention to Article 10 of "Contract Between The City of El Paso and El Paso County Water Improvement District No. 1" of August 10, 1949, which reads: "10. The City is now discharging and may in the future discharge into the Rio Grande sewage effluent resulting from the use of water for municipal, industrial and domestic purposes obtained from sources other than the project water supply. It is expressly understood that in executing this contract, or in accepting the benefits thereof, the City shall not be held to have in anywise relinquished, modified or impaired its title to, ownership of, and its rights to control and determine the use and disposition of such effluent prior to its discharge into the Rio Grande. It is further understood that after such effluent is discharged into the Rio Grande it constitutes part of the Project water supply."

Therefore, the determination of availability of ten cubic feet per second in my September 12, 1952 letter was of Project return flow water exclusive of water the City may pump from wells in the Canutillo area.

Sincerely yours,
W. F. RESCH,
Project Manager.

Blind to: Regional Director
Regional Counsel
N. B. Phillips
Louis A. Scott
Eugene T. Edwards

(At this point an instrument was marked for identification as Plaintiffs' Exhibit 93 and handed to opposing counsel for examination.)

Mr. Edwards:

Plaintiffs' Exhibit 93 is from W. F. Resch, Project Manager, to Harlan Hugg, General Manager.

Mr. Grambling:

Now this is after the suit was filed. I don't think that has any bearing on this law suit.

The Court:

Well, I wouldn't expect it to be relevant in any way. It is a communication by someone on the Plaintiffs' side of this case, isn't it?

Mr. Edwards:

It was written by Mr. Resch, yes, the witness on the stand now.

The Court:

All right. Now, the last letter here in evidence is one also from Mr. Resch to Mr. Hugg. Now is there any reply to that letter?

Mr. Edwards:

No, sir. We don't have any answer, and as far as I know there wasn't one.

The Court:

Well, just how could this letter, written after this law suit was filed, be of any value here as evidence?

Mr. Edwards:

It is offered for the purpose of showing a continued and willful violation of the contract which, if the Court rules these are not admissible, we won't offer the rest of them.

The Court:

I don't think they are admissible.

Mr. Edwards:

We do, however, have one other letter here, I believe, which I think is admissible, although it was written after the law suit was filed, because it was written from J. H. Tillman, City Sanitary Engineer, to Mr. Resch. In other words, it was one written by them to us. This one we intended to have marked as Plaintiffs' Exhibit Number 100.

Mr. Grambling:

We think it is immaterial, Your Honor. I don't think it has any bearing on the lawsuit.

Mr. Edwards:

It has a bearing on the lawsuit as showing that the City was having some trouble with disposing of this sewage effluent, which they now seem to think is so valuable, and also to show that at that time, September 29, 1953, there wasn't enough water in the river to carry off the stench fro mthe sewage effluent and they were asking for help.

Mr. Guinn:

That gentleman was an employee of the State acting in the City-County State Health Department Unit. That letter he is reading into this lawsuit—

The Court:

Well, he is a joint employee you mean of the City and the County?

Mr. Guinn:

The City and County, and paid by the State.

The Court:

Paid by who?

Mr. Guinn:

He is in the Health Department. It is a joint unit, paid by the State, employed by the State.

The Court:

Where does he have his office?

Mr. Guinn:

In the City-County Health Unit. It is down here—at the present time it is in the old library building.

The Court:
Is that building used by the City?

Mr. Guinn:
No, sir. It is a City-County joint enterprise. It is not a City building, no, sir.

The Court:
Let me see the letter.

Mr. Edwards:
This is not only signed by J. H. Tillman, Sanitary Engineer, but it is approved by M. D. Hornedo, Director of the City-County Health Unit, and it shows with a carbon copy to Honorable Fred Hervey, Mayor, Harlan Hugg and W. D. Asbury.

(The letter was then handed to the Court.)

Mr. Guinn:
We have no objection. We wanted the Court to know who he was. He is not a part of this suit.

The Court:
I see it is written on City stationery. All right.

(The letter in question was then marked "Plaintiffs' Exhibit No. 100" and was read by Mr. Edwards; and said exhibit, having been received in evidence, reads in words and figures as follows):

"P-100".

(Seal—The City of El Paso, Texas)

Fred Hervey	Aldermen
Mayor	
W. R. Collins	C. W. Harper
City Clerk	Ernest Ponce
J. M. Herrera	Tom Burnham
Deputy City Clerk	Hal E. Dean

September 29, 1953

Mr. W. F. Resch, Manager
U. S. Reclamation Service
U. S. Court House
El Paso, Texas

Dear Mr. Resch:

For the last several days this department has been receiving complaints from the residents of Lakeside Addition about the terrible sewage odors coming from the Rio Grande River. Investigation reveals that most of the small flow of the river has been diverted into Franklin Canal so that there is no dilution water in the river and it is mostly a stream of sewage below the El Paso Sewage Treatment Plant and the Glenwood Drive Sewage Treatment Plant of the El Paso Water Control and Improvement District #1.

We know that El Paso will soon start construction on a sewage plant to correct the part of the nuisance which it causes. In the meantime the residents are entitled to as much relief as possible. To this end we are wondering if dilution water can be kept in

the river at all times to help control this odor, particularly until the City of El Paso completes its secondary sewage treatment plant.

Your help in this matter will be appreciated by this department as well as the many residents in the various subdivisions near the river who are variously affected as the wind changes.

Yours sincerely,
(S.) J. H. TILLMAN,
(J. H. Tillman),
Sanitary Engineer.

JHT:ec

Approved:
(S.) M. D. HORNEDO, M. D.
(M. D. Hornedo, B.Sc., M.D., P.H.P.)
Director, City-County Health Unit

cc: Hon. Fred Hervey, Mayor
Mr. Harlan H. Hugg
Mr. W. D. Asbury

Mr. Edwards:

In order to account for the break in the numbers, we offer Plaintiffs' Exhibits 93, 94, 95, 96, 97, 98, 99, 99-A, 101, 102 consisting of two pages, or three pages, 103 consisting of two pages, 104, 105, 106.

The Court:

They were all written after the suit was filed?

Mr. Edwards:

The dates on all of these, Your Honor, are subsequent to the date on which the suit was filed.

The Court:

All right. I sustain the defendant's objection to those exhibits.

Mr. Edwards:

This means that Exhibits 93 through 99, and 101 through 106 are not admitted. They are offered, but not admitted.

(At this point an instrument was marked for identification as Plaintiffs' Exhibit No. 107.)

Mr. Edwards:

We next offer Plaintiffs' Exhibit 107, as marked, the portions on pages—well, I will put it on here (indicating).

Q. Mr. Resch, I hand you Plaintiffs' Exhibit 107 and ask you what that is?

A. This is a brochure put out by the City of El Paso with respect to the bond sale that they were having in 1954. It describes the debt requirements and the water facilities, domestic water facilities, of the City of El Paso, the well system, and what their prospects are for additional water.

Mr. Edwards:

Are you familiar with this, Mr. Grambling? (Handing exhibit to Mr. Grambling.)

Mr. Grambling:

No, I am not familiar with it. I have never seen it before, Mr. Edwards. Your Honor, we don't think this is material to any issue in this case. It seems to be a brochure that has no connection with this case. This

was a brochure put out in connection with the sale of water revenue bonds in 1954.

Mr. Edwards:

I will show the materiality of it. There is a statement in here of the operation of the Water and Sewer system, showing that they are operating at a profit, selling water for profit, and there is a history of the development of the water system, the development of the water and sewer system in El Paso, showing where they got the water, what they are doing with it, and where they are going to get some more.

The Court:

Well, that last paragraph might be relevant, but what do you think is the materiality of whether they make profit out of the water?

Mr. Edwards:

When they go talking about equity, one thing or another, and they want to take water out of the river and pay us nothing for it and sell it at a profit—

The Court:

Well—

Mr. Edwards:

In other words, Your Honor, what we want to show, of course, is that the municipal water system is an enterprise operated by the City in its proprietary capacity and not as a governmental function.

Mr. Brockmoller:

We agree to that and stipulate to that. We think it is entirely inadmissible. The fact that we may be

able to get water elsewhere is not an issue in this case. The issue here is Rio Grande water—water from the Rio Grande—and simply because we claim a right in it, and they claim a right in it, and the fact that we may be able to get some more water other places doesn't make a bit of difference. Just like socialism, we have two cows and they want one, but that isn't the question. We are talking about Rio Grande water, and what we do to try to get water elsewhere or what we tell people in connection with our bond sale is entirely immaterial to any issue in this case.

Mr. Edwards:

If the Court please, this is information which we tried to get out of Mayor Hervey when we took his deposition and which he very adroitly dodged. It shows the use of the water, when it started, and it shows the discontinuance of the use of the river water, and shows that they didn't use any water from 1918 to 1943 from the river, and shows where they are undertaking to get more water than they got. We will follow it up with some deeds to show that they got it. We think that is quite relevant as bearing on their contention that we are depriving the City of El Paso of water and, according tt their trial brief, to the extent that they are liable to die of thirst, or something like that.

Mr. Brockmoller:

May it please the Court, the question of whether or not we have any rights in the river seems to be the matter of issue here in this case. The history of what we have done in the past, that we have vested rights in the river water and haven't used them may

be true, but that doesn't stop us from having those rights. That we may have gotten water from wells, or elsewhere, is certainly immaterial, or that we have planned to take it from some other place at some time in the future, or as they did many years ago, hauled it in cans from Deming, New Mexico. All this seems to be immaterial, it seems to me.

Mr. Grambling:

Another thing, the City of El Paso has 185,000 population and we are trying to keep 55,000 troops supplied out of this same source of water supply, and we don't think what might have been applicable twenty years ago is applicable today.

Mr. Edwards:

This is applicable May the 11th, 1954.

Mr. Grambling:

But you want to show the history—

Mr. Edwards:

Yes, I want to show that your claim of rights that you say you got in the river does not exist.

The Court:

It is modern enough. I have no question about that. But I am interested in the further development of what your theory is as to how it is admissible on the question of whether the City has any rights in the Rio Grande supply such as they claim in this lawsuit.

Mr. Edwards:

We claimed in our petition that the City was not dependent on the river for water, and we have shown

a severe drought where it has worked a hardship on the farmers in this Reclamation Project to the extent of their having to build something like 1300 wells at a cost of seven or eight thousand dollars apiece, and that the City has other sources of water that are superior to any rights that they have in the river, and they show that they stopped taking water from the river as far back as 1918, and they don't come back into the river again until they signed these contracts in 1941 and 1944, which they now say are no good. It is an admission by the City, by the defendant in this case.

Mr. Guinn:

Yes, but who made those statements? Who is binding the City? After all, the City can't be bound by statements that anybody or anyone else might make. And, Your Honor, like the question you asked Mr. Edwards, how in the world can that affect what our legal rights are? This isn't a question based on pure necessity, but it is based on our legal rights to the water in the river. He talks about drilling wells and the cost of them. It cost the City to drill wells. The City did drill wells and the farmers are drilling wells, too, but that still doesn't determine whose rights, or who has rights in the water from the river. That has to be determined by this Court from legal principles and it is not a question of whether we might drill a well out here or the farmer might drill a well to get the water.

The Court:

Now, if the City of El Paso, by virtue of the laws of the State of Texas, has a prior right, such as they claim, from the standpoint of municipal use, in and

to the Rio Grande supply, then I wouldn't see how that could be admissible. Now I don't overlook the fact that the plaintiffs deny that basic contention and your position, I presume, is that any rights the City has in the Rio Grande supply of water rests upon these contracts.

Mr. Edwards:
That is right.

The Court:
And is limited to what is provided in the contracts?

Mr. Edwards:
That is right.

The Court:
We will say that you are right on that premise then. Still how would this be admissible?

Mr. Edwards:
Because they have gone to appealing on the equities in the case to endeavor to draw on the sympathy of the Court by representing that we are pressing the City of El Paso and that we are willing to stand by and see them just be in want from thirst when here we can show by their own admission that that isn't true. They are appealing to equities and we are undertaking, by their own admissions, to show that their equities are not present.

The Court:
What you refer to here is that the City of El Paso, in looking around for bond financing gives itself a good recommendation?

Mr. Edwards:
It's good reading, Judge:

The Court:
Well, let me have it and I will read it overnight. It is kind of a curious thing. I will have to read it to decide finally whether it is admissible or not.

Mr. Guinn:
If the Court please, I just wanted to make this statement: That we do not rely here in any necessity of this water. We are claiming our legal rights to that river, whether we can get it elsewhere or not.

The Court:
What Mr. Edwards is talking about, I think, is some appeal of a general nature mentioned in the brief—

Mr. Guinn:
I think that as a general proposition it refers to the rights of the City. We expect to show here—the Court will recall himself—that by their own instruments they found that we had to have this water. That was in their contract that they introduced before the Court:

Mr. Edwards:
But that was in 1941.

Mr. Grambling:
May I make one more statement? I think probably our brief impressed Mr. Edwards more than I thought it would.

The Court:

You did bring up some humanitarian complaint in your brief.

Mr. Edwards:

Pardon me, just a minute. There are three things: One is to show that they are operating the water system as a commercial enterprise in their proprietary capacity and not as a governmental function; admissions against interest to show that whatever the usage that they had in the river were abandoned in 1918. Now, Mr. Grambling, as one of the counsel, made the remark as the trial started that they were going back to 1858. Well, this history will take care of hat, and on the last page over here it goes to the question of whether the City received the benefit. Now, they said they absolutely got no benefit from those ordinances and the quitclaim deed. We have here on the last page of this brochure evidence of the benefit received from the City. Anyway, there are some three things in here that we believe to be admissible, and I have marked them. And on Page 3 and Page 15, and then—no, wait a minute, that's on Page 9 and Page 12, and then over on Page 28.

The Court:

Now on Page 28 is the one you say which tends to show benefit?

Mr. Edwards:

Consideration and benefit to the City which they say they didn't get.

The Court:

All right. The Court will adjourn until tomorrow morning a 9:30 A.M.

No. [redacted] 198

VOLUME II.

TRANSCRIPT OF RECORD.

Office - Supreme Court, U.S.
FILED
JUN 17 1957
JOHN T. FEY, Clerk

UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT.

No. 15,954

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, ET AL.,

Appellants & Cross-Appellees,

versus

CITY OF EL PASO,

Appellee & Cross-Appellant,

(AND REVERSE TITLE).

Appeal & Cross-Appeal from the United States District Court for the Western District of Texas.

(ORIGINAL RECORD RECEIVED FEB. 16/56.)

U. S. COURT OF APPEALS
FILED
OCT 17 1956
John A. Fremen, Jr

(At five o'clock, November 16, 1954, the Court adjourned until 9:30 o'clock A.M. the next morning, November 17, 1954, at which time proceedings were resumed as follows):

The Court:

The defendant's objection to Plaintiffs' Exhibit 107 will be overruled in respect to that part of the exhibit marked and found on Page 28, and will be sustained otherwise, with the reservation that the admissibility of that part of the exhibit marked and found on Pages 9, 10, and 11 may be re-examined later in the light of the testimony presented in due course by the defendant, and I can suppose that the testimony presented by the defendant may take such a turn that I would want to reconsider the ruling as to the last part of the exhibit.

Mr. Edwards:

In view of the Court's ruling, we now would like to offer separately just this much of Page 10, as is indicated in pencil, for the purpose of showing that there had been an abandonment and non-use of water by the City for a period of, I think 18 years I would say.

The Court:

All right. I will admit that additional part.

Mr. Guinn:

We would like the record to show that we did use it up until 1918.

Mr. Edwards:

We are not admitting that you used it up until 1918, but we do want to show that you did not use it from 1918.

Mr. Guinn:

We will admit that we used it up until 1918.

Mr. Edwards:

All right. I will read into the record then, from Exhibit 107.

(Plaintiffs' Exhibit No. 107, having been admitted in evidence only as to portions indicated by the Court, consists of extracts from a brochure published by the City of El Paso; the portions being offered having been marked by Mr. Edwards on Pages 9 to 12 and on Page 28; however, as heretofore indicated, the Court only admitted a part of Page 10 and that portion of Page 28 that was being offered. That portion of Page 10 which was admitted by the Court, and which is copied here as a part of Plaintiffs' Exhibit 107, was read by Mr. Edwards as follows):

"From the above you will see that water was originally obtained from the Rio Grande River and that deep wells were started in 1892, and both the well water and river water were used until 1918. Between the years 1918 and 1943 only deep well water was used in the city. In 1943 the City of El Paso, in conjunction with the U. S. Army, constructed a river water softening and filtration plant capable of treating and furnishing 10 million gallons daily to the City of El Paso."

Mr. Edwards:

And on Page 28 we offer in evidence the photograph there shown and the caption under it (Reads same, which also is being copied here as part of Plaintiffs' Exhibit 107, as follows):

"Agriculture constitutes a large part of the life blood of the city of El Paso. With water drawn from Elephant Butte reservoir 135 miles north of El Paso, these thousands of fertile acres raise crops whose value runs into the millions. Cotton and alfalfa are the principal crops. In the center of the picture is the principal highway leading to the east; at the right is the Rio Grande, here canalized and kept under control. In 1952 there was 66,365 acres of irrigated land in El Paso County with a total crop value of $26,472,566 for a total value of 405.09 per acre."

Mr. Edwards:

Now in connection with that, Your Honor, we had some other exhibits here.

Q. Mr. Resch, I hand you an exhibit which is marked "Plaintiffs' Exhibit 107a," and ask you to state what that is and how, and under what circumstances, and from what sources it was prepared?

A. This is a map titled "Map of Greater El Paso and Vicinity", on which have been indicated the locations of the City of El Paso wells, reservoirs, and also the industrial wells of private ownership, and two irrigation wells, and one or more wells of the El Paso County Conservation and Sewage Improvement District—or some similar name—that may not be correct. Also the map shows the location of the City of El Paso reservoirs within the City.

Q. From what sources was this information derived?

A. This map was prepared in my office in cooperation with advice from members of the City Water Department and from sources that we could obtain with respect to the locations of the new industrial wells.

Mr. Edwards:

We offer Plaintiffs' Exhibit No. 107a in evidence.

Mr. Grambling:

No objection.

The Court:

What number is that map, that exhibit?

Mr. Edwards:

Plaintiffs' No. 107a.

The Court:

All right.

(The map in question, being Plaintiffs' Exhibit No. 107a, was thereupon received in evidence by the Court and a photostatic copy of same appears on the following page):

EXHIBIT P-107(a)—Photostat of Greater El Paso; Omitted from the Printed Record, Pursuant to Designations of Counsel as to Printing Record, copied at pages 1 et seq.

* * * * * * * * *

(At this point an instrument was marked for identification as Plaintiffs' Exhibit No 108 and handed to opposing counsel for examination.)

Mr. Edwards:

We have here this exhibit which we would like to offer as Plaintiffs' Exhibit 108.

Mr. Grambling:

Your Honor, this deed purports to be a deed conveying certain lands located in El Paso County to the City of El Paso for the trustees of the T and P Railway Land Trust, dated June, 1954. We don't see how this could have any bearing upon this law suit and we will say it is immaterial and irrelevant and not proper evidence.

Mr. Edwards:

It was secured and is offered as support of our Exhibit 107, or as a sequel of our Exhibit 107, which is the history of the El Paso Water System and their statement as to their available supply and what they intended to do, and this is a deed to show that they were carrying out the expectations expressed in that prospective brochure with reference to securing water right land northeast of the City.

The Court:

I will sustain the objection at this time with the same reservation I noted a while ago.

Mr. Edwards:

I have two other deeds I expect to offer and I assume the Court's ruling would be the same, so we will just leave the numbers as they are.

The Court:
Yes.

Q. Now, Mr. Resch, there were a few little things I intended to ask you about yesterday and didn't get to it. One is with reference to the contracts of the two districts with the United States, and when I say "the two districts" I mean the Elephant Butte Irrigation District and the El Paso County Water Improvement District Number One. Under the contracts which have been introduced in evidence, primarily the November 10, 1927 and January 17, 1920 contracts, do either of those districts or both bear a pro-rata part of the expense of construction work in the other?

A. Yes, sir.

Q. Explain how and what it is.

A. The El Paso County Water Improvement District Number One is paying approximately 43 percent of the construction cost of the Percha Diversion Dam, Leasburg Dam, Mesilla Diversion Dam, the main canal system in New Mexico and, to a lesser percentage, in certain instances on portions of the lateral system and of the drainage system. At the same time the Elephant Butte Irrigation District of New Mexico is paying approximately 57 percent of the cost of the main canal system in the El Paso County Water Improvement District Number One.

Q. Now by what means is water delivered to that portion of the El Paso County Water Improvement District Number One, which lies above the City of El Paso, that is, upstream from the American Dam?

A. The water that serves that portion of El Paso County Water Improvement District Number One, lying above the City of El Paso, is served by diver-

sions made in New Mexico at the Mesilla Diversion Dam, approximately 39 miles upstream from the American Dam. The water so diverted is carried from the canals and laterals of New Mexico down into Texas and, in several instances, crosses, re-crosses, crosses, re-crosses the State line.

Q. Mr. Resch, in the amended statement of appropriation of water under the old Irrigation Act of 1889 made by Loomis and others, and which has been offered in evidence here, it shows the capacity of the canal at that time to be 31 cubic feet per second. How much would that be in acre feet per year?

A. That would be about 240,000 acre feet a year.

Q. Mr. Resch, I don't know whether it has been stated into the record as to what an acre foot of water is.

A. An acre foot of water is sufficient water to cover one acre one foot deep.

Q. Mr. Resch, you have been familiar with the contract of December 1, 1941 between the City of El Paso, the United States of America, and the El Paso County Water Improvement District Number One, and which has been offered in evidence here, have you not?

A. Yes, sir.

Q. That had reference to facilities being installed to enable the City of El Paso to divert water under that contract and, I believe, according to evidence which has been offered, that was compiled with and facilities were furnished. What were those facilities?

A. The facilities consist of the water treatment plant located on the bank of the Franklin Canal in west El Paso.

Q. And when did the City first start taking water into that treatment plant from the canal or the river?

A. In November, 1943.

Q. Now you sated that you came to El Paso when?

A. 1921.

Q. In 1921? Well, prior to 1943, when the City started taking water from the Franklin Canal, or the river, into its treatment plant, how long, within your knowledge, had the City not been taking water from the river or the Franklin Canal at all?

A. Since March or April, 1925.

Q. Between March or April, 1925 And when they completed the water treatment plant in 1943, did they have any facilities at all for taking water from the river ino the municipal water system?

A. No, sir, not to my knowledge, and I was along the river frequently.

Q. Mr. Resch, is it a fact that the only repayments to the government that have been made toward the reimbursement for the expenditures on project works and construction of the project facilities, other than such payments as have been made by the City under these contracts, with reference to the water system, have been made by the two districts, that is, Elephant Butte Irrigation District and the El Paso County Water Improvement District Number One?

Mr. Grambling:

We don' see that that has any material bearing on this issue.

The Court:

I will overrule the objection.

A. That is correct.

Mr. Edwards:

If the Court please, we have completed our direct examination of Mr. Resch at this time, but we have another witness who is desirous of leaving El Paso and Mr. Grambling has stated that it would be satisfactory to them if it is agreeable to the Court to allow us to use him now, and then let him cross-examine Mr. Resch at the completion of the other testimony.

The Court:

Very well.

Mr. Williams:

Your Honor, for the purpose of the record, I would like it to be understood, if it isn't already, that all evidence being offered by any one plaintiff is offered on behalf of all plaintiffs and any objection being made by one plaintiff will be in behalf of all plaintiffs

The Court:

Is that all right, Mr. Edwards?

Mr. Edwards:

That is all right with me.

The Court:

All right.

Mr. Edwards:

We will call Mr. Friedkin.

(Mr. Resch was then temporarily excused, to be later recalled for cross-examination.)

Mr. Edwards:

Before proceeding with Mr. Friedkin's examination I would like to read in evidence the joint resolution of the Senate and House of Representatives of February 13, 1935, Public Resolution No. 4, marked as Plaintiffs' Exhibit No. 109 (Reporter marks same).

Mr. Grambling:

We have no objection.

(Plaintiffs' Exhibit No. 109 was then read by Mr. Edwards, and, having been received in evidence by the Court, reads in words and figures as follows):

EXHIBIT P-109 Joint Resolution of the Senate and House of Representatives of 2/13/35. Public Resolution No. 4; Omitted from the Printed Record, Pursuant to Designations of Counsel as to Printing Record, copied at pages 1 et seq.

* * * * * * * *

J. F. FRIEDKIN, a witness called by the Plaintiffs, having first been duly sworn, in answer to questions propounded, testified as follows:

—On Direct Examination.

Questions by Mr. Edwards:

Q. State your name, please.

A. My name is J. F. Friedkin.

Q. And what is your business and occupation?

A. I am an engineer with the United States section of the International Boundary and Water Commission.

Q. How long have you been with them in that capacity?

A. I have been with the United States section since 1934 except for the war years.

Q. Do you have personal knowledge of what was done by the American section of the International Boundary Commission with reference to carrying out the provisions or purposes expressed by Congress with reference to the canalization of the Rio Grande from up near Caballo Reservoir site down to the American Dam?

A. Yes, sir. I do.

Q. Were drawings or maps or plats made covering this area by the United States section of the Boundary Commission?

A. Yes, sir, they were.

(At this point an instrument consisting of three sheets was marked for identiffication as Plaintiffs' Exhibit 110.)

Q. I will ask you to examine Plaintiffs' Exhibit, or an instrument marked "Plaintiffs' Exhibit No. 110", and consisting of three sheets, and state whether these are official plats or records obtained from your office here in El Paso?

A. Yes, sir. Those are official records of our office. They were made in the United States section.

(The exhibit was then shown to opposing counsel for their examination.)

Mr. Grambling:

Okay

Mr. Edwards:
We offer this in evidence.

The Court:
All right.

(Plaintiffs' Exhibit No. 110, consisting of three sheets, was thereupon received in evidence by the Court, and photostatic copies of this exhibit appear on the pages following):

Note

Page 753 is on Card 17
Page 754 is on Card 18
Page 755 is on Card 19

Q. I will ask you to state what was done by the American section of the International Boundary Commission with reference to carrying out the authorization as given by Congress?

A. Following the joint resolution of the Congress authorizing the investigations to determine, as was stated, the feasibility and the best means of canalizing the river, a report was made, investigations and report were made showing that it was feasible, and later in the same year, 1935, the Congress passed an Act appropriating funds in the amount of a million dollars for the construction of a diversion dam wholly in the United States and for the acquisition of personal and real property required therefor in order to facilitiate the carrying out of the provisions of the 1906 Treaty, that is, the obligation under that Treaty.

Mr. Grambling:

Treaty with who?

A. The 1906 Treaty with Mexico. And in order to regulate and control to the fullest extent possible the waters of the Rio Grande for use by the two countries under that treaty with that appropriation of a million dollars, construction was initiated about that time of what is known as the American Dam. The dam was located wholly in the United States. In the following year, 1936, the Congress of the United States appropriated funds in the amount of three million dollars for the canalization of the river from the Dam, the Caballo Dam site, down to the American Dam, a distance of about 110 miles. Again the wording of the authorization in the appropriation was to facilitate compliance with the 1906 Treaty with Mexico in regard to the United States' obligation to deliver

waters to Mexico and again to effect the control and regulation, so far as possible, of the waters of the Rio Grande for use by the two countries. With that appropriation construction was started in 1938 of improvements to the channel of the Rio Grande from Caballo Dam to the American Dam, and that improvement of or to the channel consisted of modifying it, narrowing it, and straightening it in order to make it a more efficient channel for carrying water. The work was done. There was some excavation of the channel. There were jetties, which are lines of rocks extending from the bank in order to confine the channel, to confine the waters, and there was constructed a floodway in addition to the normal channel which varies in width—the floodway—between about four hundred and eight hundred feet, and which is bound by levees on both sides, which extend practically up to Caballo Dam except in the canyon sections where levees were not required. As a part of the program there were acquired by donation, or by purchase, or condemnation, a little over eight thousand acres at a cost of some $450,000 to the United States. Would you like further details?

Q. I would like to ask you to just point out to the Court the features on this plat (indicating)—if you can hold these up or, I can hold them up, so you can point out to the Court on here just where the levees are and what was done, the changes that were made, in the different sections of the Project?

A. This is a strip map extending from a point near the American Dam, or rather, near the point where the Rio Grande first becomes the international boundary in El Paso, that is up near the Smelter, and it extends from that point North to about to where the El Paso Electric Company plant is located. That is a

(P.708)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
RIO GRANDE PROJECT — NEW MEXICO-TEXAS

GENERAL MAP — ANTHONY to EL PASO

SHOWING PRINCIPAL IRRIGATION FACILITIES & CITY OF EL PASO WATER TREATMENT & SEWERAGE FEATURES

DRAWN	SUBMITTED	
TRACED	RECOMMENDED	
CHECKED	APPROVED	
El Paso, Texas	January 1st 1932	23-503-5407

TRACT NO.	ACREAGE	PREVIOUS OWNER	RECORDING DATA
475	26.91	E. Holguin	7/8/39, Vol.652, P.19
476	18.28	Hemley & Rishaberger	5/17/39, Vol.644, P.516
477	3.47	C.R.Loomis	5/18/39, Vol.646, P.499
478) 479) Comb.	27.58	" " "	5/18/39, Vol.650, P.140
478-1	.31	" " "	8/9/39, Vol.650, P.568
480	8.91	" " "	5/18/39, Vol.646, P.497
481	37.26	M.R.Hemley, Ind.Ex., etc.	5/5/39, Vol.649, P.280
482	5.76	Ch. Singh	8/18/39, Vol.651, P.581
483) 483-1) Comb.	1.94	G.D.Kilcrease	7/25/39, Vol.651, P.481
484	71.10	A.M.Greenwood	4/13/39, Vol.646, P.301
485	.05	Hemley & Rishaberger	5/23/39, Vol.650, P.163
486 Tr.A.	2.31	H.V.Colls	7/28/39, Vol.650, P.453
486 Tr.B.	25.90	A.M.Greenwood	7/27/39 Vol.650, P.451
487	6.58	J.A.McKinnon, et al	4/28/39, Vol.649, P.126
488	2.81	H.V.Colls	7/8/39, Vol.652, P.20
489-1	2.17	A.A.Howell	4/6/39, Vol.648, P.335
489(Condem)	23.79	H.M.Mundy Heirs,et al	U.S.Dis.Ct., W.Dis.Tex #42 Civ. Fin.Judg.7/1/41
490(Condem.)	2.94	Mundy & Madrid Heirs, et al	U.S.Dis.Ct., W.Dis.Tex.#35 Civ., Ord. conf. title & poss. 6/13/39

Plaintiffs' Exhibit 148e, having been received in evidence by the Court, a photostatic copy of same appears below:

"P-148e"

Additional Water Statement
For 1953

No. 4863
No. ~~4956~~

El Paso County Water Improvement District No. 1
308 EL PASO NAT'L BANK BLDG., EL PASO, TEXAS

City of El Paso

COPY

This statement when signed and Machine Certified becomes a receipt

Return with your remittance

This account only covers water used in excess of 2 acre feet per irrigated acre. The current Tax Levy covers the use of 2 acre feet per acre and is shown on separate statement. This account becomes delinquent if unpaid on Feb. 1st next.

DATE
Oct. 14 1953

Interest Charged After Jan. 31, next

Descriptions used are from the official maps of the County of El Paso

PROPERTY DESCRIPTION					SERVICE	TOTAL
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name		
17 UV	2A, 2C & all	other Tracts			Total Acre Feet Delivered 3260.20 Acre Feet covered by Tax Roll 2918.20 Acre feet covered by this Account 342.00 $1.00 (RATE PER ACRE FOOT) Allotment or Storage Water used under Contract of Feb. 18, 1941 and Contract December 1, 1944 (Water-right Land)	342.00
					TOTAL	342.00
					Due Interest	41.04
					ADD AMOUNT OF THIS BILL TO YOUR CURRENT TAX STATEMENT Total	$383.04

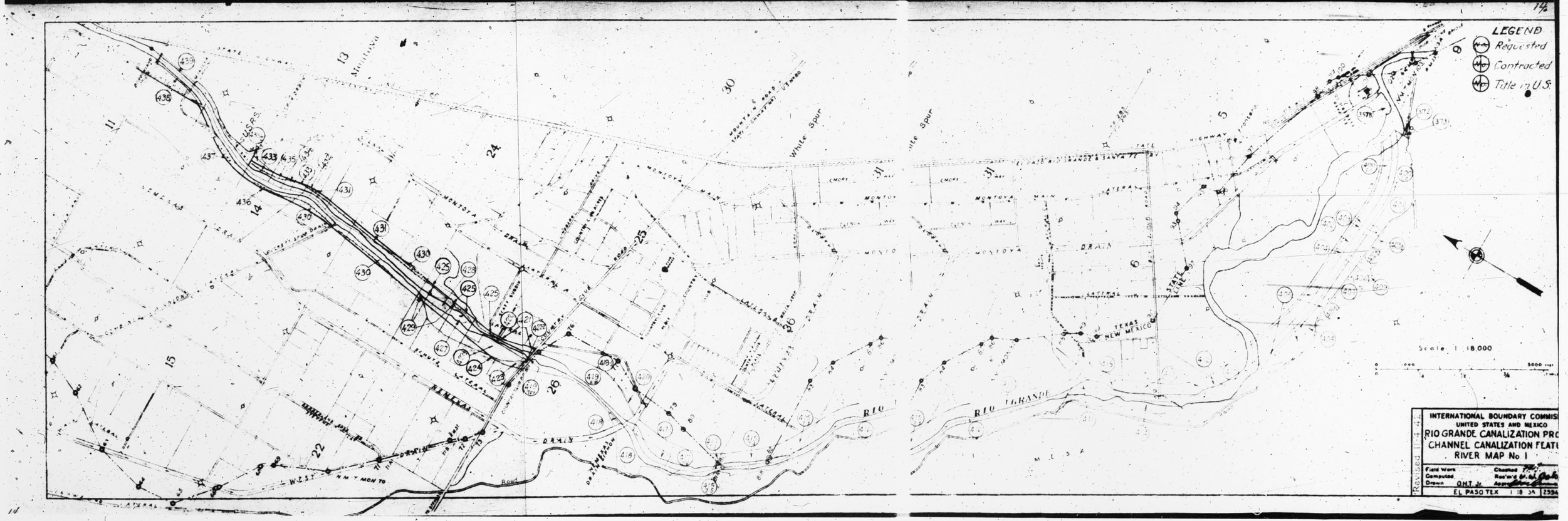
Received Payment

Valid receipts are machine certified in this space.

Collector

Plaintiffs' Exhibit No. 148E
CA 1409
MCV

753



LEGEND
Requested
Contracted
Title in U.S.
Scale 1:18,000
INTERNATIONAL BOUNDARY COMMIS
UNITED STATES AND MEXICO
RIO GRANDE CANALIZATION PRO
CHANNEL CANALIZATION FEAT
RIVER MAP No 1
Field Work
Computed
Drawn O.H.T. Jr.
Checked
Rec'm'd
Appr
EL PASO TEX 1 18 34
2594
Revised 11-4-42
RIO GRANDE
MONTOYA DRAIN
MONTOYA MAIN
White Spur
TEXAS
NEW MEXICO
STATE LINE

995

"I-14-1" (First sheet)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 869

City of El Paso

PAGE 35

COPY

LINE 45

Pauline G. Delaney

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
17	2A, 2C								
UV					91.91		574.44	18.38	592.82

996

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1
705 El Paso National Bank Bldg., El Paso, Texas

871

No. ~~1[illegible]~~X

City of El Paso
% Water Department
El Paso, Texas

COPY

PAGE 35

LINE 46

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate I/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
17 UV	3C				17.45		109.06	3.49	112.55
								TOTAL	$

997

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 876

PAGE 35

City of El Paso

COPY

LINE 47

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
									$
17	5B								
UV					4.42		27.63	.88	28.51
								TOTAL	$

998

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. ~~1000~~ 893

PAGE ~~40~~ 35

City of El Paso COPY

LINE 48

Descriptions used are from the Official Maps of the County of El Paso.

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No	SUBDIVISION Lot	Blk	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX $
17	22C								
UV					.53		3.31	.11	3.42
								TOTAL	$

999

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

909

No. ~~XXXXXXX~~

PAGE 35

City of El Paso

COPY

LINE 49

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION					Taxable Acres	TAX			
Blk No.	Tract No.	SUBDIVISION Lot	Blk	Name		Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
									$
[illegible]	-1				4.31		30.06	.96	31.02
								TOTAL	$

1000

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

910

No. ~~XXXXXX~~

PAGE 35

City of El Paso

COPY

LINE 50

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	SUBDIVISION Blk.	SUBDIVISION Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
18	6C								
UV					63.91	-	399.44	12.78	412.22
								TOTAL	$

1001

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

915

No. [redacted]

City of El Paso

PAGE 35

COPY

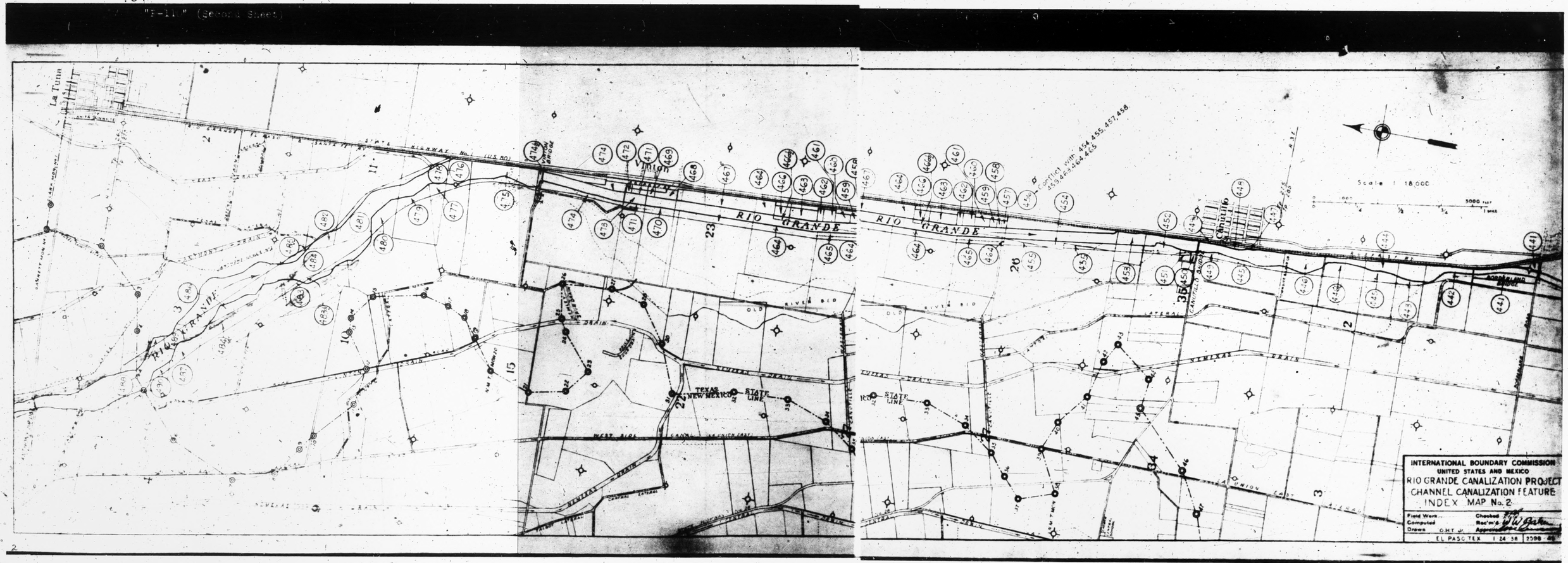
LINE 51

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate $ 20	TOTAL TAX $
18	12s-3 12G								
UV					48.91		305.69	9.78	315.47

754

"I-11" (Second Sheet)



1002

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. I

705 El Paso National Bank Bldg., El Paso, Texas

916

No. ~~10091X~~

City of El Paso

PAGE 36

COPY

LINE 1

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $6.25	Reservoir Service Charge Rate .20	TOTAL TAX
18	12D, 12E								$
UV					40.75		254.69	8.15	262.84
								TOTAL	$

1003

"P-145f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 917

City of El Paso

COPY

PAGE 36

LINE 2

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION					Taxable Acres	TAX			
Blk. No.	Tract No	SUBDIVISION Lot	Blk	Name		Repayment Construction Rate 1/28	Maintenance & Operation Rate 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
18	12-2								$
UV					.24		3.13	.10	3.23
								TOTAL	$

1004

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 1164

City of El Paso

COPY

PAGE 36

LINE 3

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION					TAX			
Blk No.	Tract No.	SUBDIVISION Lot	Blk	Name	Taxable Acres	Repayment Construction Rate 1/2% - Flat $ 6.25	Maintenance & Operation	Reservoir Service Charge Rate .20	TOTAL TAX $
2	Lt.								
Serial		Pt.13	6	Alameda	.41		3.13	.10	3.23
								TOTAL	$

1005

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1 7418

705 El Paso National Bank Bldg., El Paso, Texas

No. [redacted]

City of El Paso

PAGE 36

COPY

LINE 4

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/20	Maintenance & Operation Rate 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
41 Ysl.	5B				.84		5.25	.17	5.42
								TOTAL	$

1006

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 8269

PAGE 36

City of El Paso

COPY

LINE 5

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
52 Ysl.	12B				11.84		74.00	2.37	76.37
								TOTAL	$

1007

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

8270

No. ~~10989~~

City of El Paso

COPY

PAGE 36

LINE 6

Descriptions used are from the Offical Maps of the County of El Paso

PROPERTY DESCRIPTION					Taxable Acres	TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk	Name		Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate $ 20	TOTAL TAX
52	120								$
Ysl.					41.69		260.56	8.34	268.90
								TOTAL	$

1008

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

615 El Paso National Bank Bldg., El Paso, Texas

8298
No. XXXXXX

PAGE 36

COPY

LINE 7

Copy of El Paso

Subdivisions and are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION SUBDIVISION Lot	Block	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
			24.29		151.81	4.86	$ 156.67
						TOTAL	$

1009

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1 8337

705 El Paso National Bank Bldg., El Paso, Texas

No. [redacted]

City of El Paso

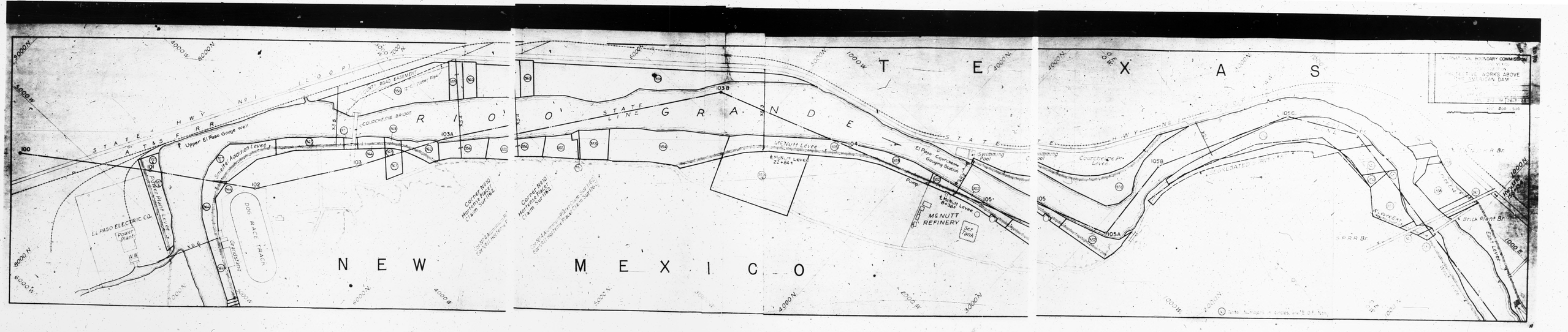
PAGE 36

COPY

LINE 8

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
4	2A								
Soc					8.82		55.13	1.76	56.89



TEXAS
NEW MEXICO
RIO GRANDE
STATE LINE
STATE HWY No 1 (LOOP)
A.T.&S.F. R.R.
Upper El Paso Gauge Well
Smelter Addition Levee
COURCHESNE BRIDGE
COUNTY ROAD EASEMENT
DOG RACE TRACK
Grandstand
EL PASO ELECTRIC CO.
Power Plant
Power Plant Levee
Corner No 10 Hortense Placer Claim Surf 162
McNutt Levee
McNutt Levee 22+84±
McNUTT REFINERY
Ser. Tank
El Paso Courchesne Gauging Station
Pump
Swimming Pool
Courchesne Br. Levee
Brick Plant Br.
East Levee
INTERNATIONAL BOUNDARY COMMISSION
PROTECTIVE WORKS ABOVE THE AMERICAN DAM
100
101
102
103
103A
103B
104
105
105A
105B
105C

1010

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

8339
No. ~~110805~~

PAGE 36

City of El Paso

COPY

LINE 9

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk No.	Tract No.	SUBDIVISION Lot	Blk	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
									$
4	22				18.65		116.56	3.73	120.29
								TOTAL	$

1011

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

8340

No. XXXXXX

City of El Paso

COPY

PAGE 36

LINE 10

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION					TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
4	2F								$
Doc					31.46		196.63	6.29	202.92
								TOTAL	$

1012

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

8462

No. 1

City of El Paso

PAGE 36

COPY

LINE 11

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX $
9 Soc.	27				3.37		21.06	.67	21.73

1013

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 8430

PAGE 36

City of El Paso

COPY

LINE 12

Descriptions used are from the Offical Maps of the County of El Paso

PROPERTY DESCRIPTION				TAX			
Tax No.	Tract No.	SUBDIVISION Lot	Blk	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
					13.26		82.88	2.65	$ 85.53
								TOTAL	$

1014

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

8504

No. ~~10000~~

City of El Paso

PAGE 36

4PY

LINE 13

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
12	14A								$
Soc.					18.73		117.06	3.75	120.81
								TOTAL	$

1015

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 8507

City of El Paso

PAGE 36

COPY

LINE 14

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION					TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX $
12	160				17.66		110.38	3.53	113.91
								TOTAL	$

distance of a little over two miles. At the lower end, in here (indicating), not shown on the map, is the location of the American Dam wholly in the United States, two hundred feet upstream from the point where the river becomes a boundary between the two countries. From that point upstream lands were acquired on both sides of the river except for a small stretch in here (indicating) and a small stretch in here where the river was near the highway and the railroad. In this section there has been a confining works constructed, that is, to confine the waters, make it a more efficient channel, and the banks have been imbedded with rock along this section in through here (indicating). The next strip extends from the end of the first strip, that is, from near the power plant it extends upstream to the Borderland Bridge, which is a distance of about six or seven miles from there, approximately, and in that reach we made a new channel. This old channel was a meandering very inefficient channel through here, and a new channel, with a straighter and more efficient alignment, was cut through here (indicating), and through the remaining part through here the old channel was improved by confining works and stabilized by revetments along the banks of the channel. In the first strip map, and in the second, levees are constructed on both sides of the channel to confine flood waters and that also applies through this channel (indicating) up to Borderland. The third strip extends from the Borderland Bridge up to La Tuna, and in that strip there the channel alignment was changed, the original channel was re-confined (indicating).

The Court:

Now, where is that?

A. That is La Tuna, and through this reach, both on the river banks and the bed, lands were acquired by the United States in order to permit performance of the work.

The Court:

In order to permit performance of the work?

A. Well, performance of the construction work which was done on the channel. The lands were acquired either by purchase or donation, and in some cases by condemnation, to effect, to permit Federal control as authorized by the Act and our work in the construction of levees and maintenance and operation of the levees in the channel there.

Q. And La Tuna is on the New Mexico-Texas line?

A. Yes.

Q. Now, was similar work done from La Tuna, that is on the New Mexico-Texas line, on up to Caballo Dam site??

A. On up to the Caballo Dam site similar work was done. There were several reaches in the river in the Seldon Canyon near Leasburg Dam where it represented a good alignment and where it was not necessary to perform work. Of the 110 miles of river about ninety percent of the channel was improved by, as I say, the water confinement works were installed, revetments placed, and there were constructed about 130 miles of levves along the channel. The work was completed in 1938 and it is still operated and maintained by the American section of the International Boundary and Water Commission.

(At this point an instrument was marked for identification "Plaintiffs' Exhibit No. 111".)

Q. I will ask you to examine document marked "Plaintiffs' Exhibit No. 111" and state whether that is a tabulation from the records of your office showing the acquisition by the United States of America of land in Texas with reference to the canalization project by deed or by condemnation suit?

A. Yes, sir. This is a list prepared by our office.

(The exhibit was shown to opposing counsel after which same was received in evidence by the Court and photostatic copies of same appear on the pages following):

Note

Pages 761-762 are on Card 3;
Page 763 is on Card 13;
Page 764 is on Card 16

Mr. Edwards:

(Referring to "P-111") I will not trouble to read it but it is a list of about one hundred deeds and condemnation suits whereby the Government acquired lands in connection with the canalization of the river. I next offer "Plaintiffs' Exhibit 110a" (Reporter marks same), which is certain portions of the New Mexico Enabling Act. I want to read the caption of the Act on Page 557 and the last paragraph, which is Paragraph Seven, on Page 559, as appear in 36 U. S. Statutes at Large. (Shows to opposing counsel.)

Mr. Grambling:

Okay.

(Plaintiffs' Exhibit 110a, having been received in evidence and read by Mr. Edwards, is as follows):

'P-110-a".

"Chap. 310.—An Act To enable the people of New Mexico tt form a constitution and state government and be admitted into the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original States. (On the margin: June 20, 1910—H.R. 18166. Public No. 219.)

Seventh. That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress entitled 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and

Territories to the construction of irrigation works for the reclamation of arid lands,' approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a Territory."

Mr. Edwards:

That same language is in the constitution of New Mexico of which the Court can take judicial notice.

Questions by Mr. Edwards (Cont'd):

Q. Mr. Friedkin, I hand you Plaintiffs' Exhibit No. 112, consisting of fourteen sheets (Reporter marks same), and ask you if these sheets constituting this exhibit are from the office of the International Boundary and Water Commission here in El Paso showing the river rectification project under the Treaty of 1933 with the Republic of Mexico?

A. Yes, sir. These are maps prepared by the American section.

(Plaintiffs' Exhibit 112 was shown to opposing counsel after which same was received in evidence and photostatic copies of this exhibit appear on the pages following):

Note

Pages 767-780 are densely printed photostats which, although they might be reproduced with poor legibility, are being omitted at the discretion of the cameraman.

Direct Examination of Mr. Friedkin (Cont'd):

Questions by Mr. Edwards:

Q. Without going into each one of these fourteen sheets, take the first one here (indicating) and just point out to the Court what the map shows and what was done with reference to the rectification of the river from El Paso to Box Canyon near Fort Quitman.

A. This first map is quite typical of the work performed under what is known as the Rio Grande Rectification Project. It is an international project of the United States and Mexico under the Treaty of 1933. In its natural form the Rio Grande below El Paso to the end of the El Paso-Juarez Valley was a series of unstable meanders as shown by the natural channel there. Because of the natural form of the channel, the meanders, and in many places the rising of the channel, there was a severe flood problem for the cities of El Paso and Juarez and to the valleys, the Juarez Valley and the El Paso Valley. Also, because this meandering channel was quite unstable there were problems from time to time as regards changes in the boundary due to natural shifting of the old channel. To remedy both the flood problem and to stabilize the river, a straight channel was constructed, practically a straight channel, or tangents, and these occurred right through the entire valley. The original channel one hundred fifty-five miles in length along these meanders was reduced to a straight channel eighty-five miles in length. The channel itself consists of what we call a pilot channel, a small channel located within a floodway bounded by levees. The small channel was constructed according to the design to a width of about sixty-six fee, depth of about

three feet, and located within the floodway, as I mentioned, which is about six hundred feet in width bounded by levees which range from four to six feet in height. The straight channel, just as shown here, was carried through for a distance of eighty-five miles to replace the old channel. That work was undertaken in 1934 and completed about 1938.

Q. Mr. Friedkin, I now hand you Plaintiffs' Exhibit No. 113 (Reporter marks same), and ask you to state whether or not this is from the records of the International Boundary and Water Commission in El Paso showing the so-called Chamizal tract?

A. Yes, sir, it is.

("Plaintiffs' Exhibit No. 113" was then shown to opposing counsel and thereafter admitted in evidence, but same has no bearing on points of appeal and is being omitted from this record in accordance with agreement of counsel.)

Q. Mr. Friedkin, I now hand you an aerial photograph marked "Plaintiffs' Exhibit Number 114" (Reporter marks same), and ask you whether this is from the records of the International Boundary and Water Commission here in El Paso?

A. Yes, sir. This is also from the records.

Q. And what does that show?

A. This is an aerial photograph of the southern portion of the City of El Paso showing by a line superimposed on the centerline of the river in 1852 according to best information available, and outlining from between that and the present river the Chamizal zone. It also shows a portion of Cordova Island and it shows the present river from a point about opposite 7th Street down through to the head of the rectification program.

(The photograph in question, being Plaintiffs' Exhibit Number 114, was thereupon received in evidence but same has no bearing on points of appeal and is being omitted from this record in accordance with agreement of counsel.)

Q. Now, if you will step right over here and show to the Court on this photograph the area where the rectification project starts?

A. Here are the bridges across the river from El Paso to Juarez and down from there about a mile and a half begins the Rectification Project. Right here (indicating), for example, you see the old channel of the river, and here (indicating) is where we began the Rectification Project right at that point there which is the head of that strip map turned over to you a while ago. This is El Paso (indicating). This is what is known as the Chamizal area (indicating) and that is what is known as Cordova Island (indicating).

The Court:

Which is the Chamizal tract?

A. The Chamizal tract extends to about from here where this line is superimposed here (indicating) and comes down through to a point here and then comes back through to a point here into the river.

Q. Can you apply this photograph to the map?

A. Now, this white line which has been superimposed on this aerial photograph corresponds to the center line of this flat channel which is noted in here tion we have; and the rectification project on this as the channel of 1852 according to the best informamap begins right at the end here (indicating).

Q. Now, Mr. Friedkin, just what is the Chamizal tract?

A. The Chamizal tract is a tract located between the present river and a line which is not fully determined as the old channel of the river in 1852. It is a piece of land that is in dispute between the United States and Mexico.

Q. Well, now, is that a tract of land to which the international title is in dispute between the United States and Mexico?

A. Yes, sir.

Q And is that the only gap in it, in the canalization or channelization or rectification of the river from Caballo Dam site down to Box Canyon at Fort Quitman?

A. No, sir. There is a small gap from the head of what is known as the Chamizal to the American Dam. It is from a point of about the International Dam to the American Dam, to the point where the Rio Grande becomes a boundary between the two countries.

Q. And the distance from Caballo Dam site to Box Canyon at Fort Quitman is roughly how many miles?

A. It is about two hundred and one or two miles.

Q. About two hundred and one or two miles?

A. Yes, sir.

Q. Now, this gap in El Paso brought about by a dispute in the international title is about how many miles?

A. It is approximately three miles.

Q. About three miles?

A. Yes.

Mr. Edwards:

You may take the witness.

On Cross Examination.

Questions by Mr. Grambling:

Q. Mr. Friedkin, I believe you said that this American Dam up here was built for the purpose of carrying out the treaty provisions of 1906 between the United States and Mexico, is that correct, with reference to the distribution of water?

A. Yes, sir.

Q. Would you tell the Court what that treaty provides that you referred to, that part of the treaty?

A. I am unable to quote it verbally.

Q. Just the substance of it is all.

A. The Treaty of 1906 between the United States and Mexico provides that the United States shall deliver annually to Mexico sixty thousand acre feet at the head of what is known as the Acequia Madre which is the heading of the Mexican Canal which waters the Juarez Valley and which heading is located at the International Dam about opposite Hart's Mill, about two miles downstream from the American Dam.

Q. In other words, that dam was constructed there by the United States Government in order to carry out the provisions of the Treaty of 1906 between Old Mexico and the United States, is that correct?

A. Yes, sir.

Q. Now, did the District, the El Paso County Water Improvement District No. 1, pay any part of the expense of that American Dam there?

A. No, sir. That was financed entirely by the Federal Government.

Q. And it was financed, was it not, for the benefit of all the people?

Mr. Edwards:

That calls for a conclusion of the witness and the Acts of Congress under which the work was carried out.

Mr. Grambling:

He has been allowed to testify at great length about the purposes of these various things and he is here as a representative of the International Boundary Commission and I assume they are vouching to that extent for him.

Mr. Edwards:

But the Joint Resolution of the Senate and the House of Representatives states the purpose.

The Court:

I sustain the objection. I think that would be a conclusion.

Q. How is that American Dam operated, would you tell us that, Mr. Friedkin?

A. Yes, sir. Let me explain the way it is built first. The dam consists of river gates across the river. There are thirteen 20-ft. gates across the river, and then there are diversion gates to divert water into a canal on the United States side known as the American Canal and which extends from the American Dam on the American side of the river downstream two miles to the Franklin Heading to a point just back of the old Franklin Canal heading. In the operation of the American Dam, the total water coming down the river and reaching the dam, the portion allocated to Mexico under the 1906 Treaty is by gates released under control for Mexico and that water

proceeds down the river bed to the head of the Acequia Madre. The water for the United States is diverted into the American Canal and is carried in that canal to the Franklin Canal where it enters into it.

Q. Now, it isn't your position or the position of the International Boundary Commission, rather, that the construction of this American Dam had any bearing upon the rights of the people of Texas or anyone else to the water in the river, is it?

Mr. Edwards:

That again calls for a conclusion, Your Honor. We object for that reason.

The Court:

Do you think you know?

The Witness:

I am not in a position to answer that, Judge.

The Court:

All right.

Mr. Grambling:

I would like at this time, Your Honor, to read into the record the Cession Act of 1934 of the 43rd Legislature of the State of Texas with reference to this matter: (Reads)

"Section 1. In order to facilitate the accomplishment of the project for the rectification of the Rio Grande in the El Paso-Juarez Valley, without cost to the State of Texas, and made possible by the Convention between the United States of America and

the United Mexican States, concluded February 1, 1933, all right, title and interest of the State of Texas in and to the bed and banks of the Rio Grande in El Paso County which may be necessary and expedient in the construction of the project for the rectification of the channel of the Rio Grande, as provided for in said Convention, is hereby ceded unto the United States of America. Provided, however, that this cession is made upon the express condition that the State of Texas shall retain concurrent jurisdiction with the United States of America over every portion of the lands so ceded which shall, upon completion of such river rectification, remain within the territorial limits of the United States so far that all processes, civil or criminal, issuing under the authority of this State or any of the Courts or judicial officers thereof, may be executed, by the proper officers of the State, upon any person amenable to the same, within the limits of the land so ceded, in like manner and with like effect as if this cession had not taken place. It is provided further that nothing in this Act contained shall be construed to be a cession or relinquishment of any rights which the State of Texas or citizens or property owners therein may hold or possess in the waters of the Rio Grande, and in the use thereof, and in the access thereto."

(Questions by Mr. Grambling, cont'd):

Q. Now, I would like to ask you, Mr. Friedkin, if in the operation of these facilities which were constructed by the International Boundary Commission you have recognized the provisions of this Act and attempted to follow them?

Mr. Edwards:

Just a minute. I don't think that Mr. Friedkin has authority to establish a policy of the United States.

Mr. Grambling:

I am just asking whether he knows if they have recognized the conditions and validity of this statute in operating this project that they constructed.

The Court:

Do you so know?

The Witness:

No, sir. I don't know.

Q. Well, is your information limited to these maps, Mr. Friedkin, is that the extent of your information with reference to the International Boundary Commission?

A. Largely, yes, sir, Mr. Grambling.

Q. You testified down there in connection with the Falcon Project, didn't you, before the Texas Board of Water Engineers?

A. Yes, sir.

Q. And Resources Committee?

A. Yes, sir.

Q. And in that you gave testimony down there that it is necessary to get water rights from the State of Texas in connection with the operation of that dam, didn't you?

A Right.

Q. Now, you have mentioned the fact that they built this American Dam and then they channelized or canalized—I don't know which is the difference between the two—anyway, they made the river straighter than it was. You say they made it straight. You mean they made it straight with tangent and curves?

A. That is right.

Q. You don't mean they had one long tangent up here from Caballo Dam to Fort Quitman?

A No. I didn't mean that.

Q. I will ask you, was any of the expense of channelizing that river or building the American Dam paid by the El Paso County Water Improvement District Number One or the members thereof, so far as you know?

A. No, sir. It was all Federal expenditure.

Q. And was that done for the benefit of all the people of Texas, as far as you know?

Mr. Edwards:

That again calls for a conclusion of the witness, and we object for that purpose.

The Court:

I sustain the objection.

Q. Was any part of that expense to be reimbursed to the United States by the Water Improvement District Number One of El Paso County?

A. No. The legislation does not provide for reimbursement.

Q. And as far as you know not a dollar has been reimbursed?

A. No.

Q. I will ask you, didn't the members of the Plaintiff District get a decided benefit from those improvements by virtue of having a smaller distance or shorter distance to have their water transported?

A. Yes, sir. From an engineering standpoint there was an improvement in the delivery of water.

Q. And there was an improvement in the lack of usage if water and the loss of water in transporting the water?

A. Right.

Q. In other words, what is the distance of this new channel from Caballo Dam down to the City of El Paso, down to the American Dam up here?

A. About 100 miles.

Q. How far was it before you corrected the channel?

A. I don't have the exact figures. The straightening job wasn't anything like it was down below.

Q. What would you say, approximately?

A I would say approximately 115 to 120 miles, perhaps 125.

Q. You would say several miles distance?

A. Right.

Q. It eliminated certain curves?

A. Right.

Q. That, of course, did result in benefit to the District, didn't it?

A. It benefitted the irrigation use.

Q. Well, that is what I mean. It benefitted the operation of their irrigation. They got more water and had more water available to them, didn't they?

A. Well, if you mean more water by reduction of losses.

Q. That is what I mean. Now, can you give us this information: If you start out with a cubic foot of water at the outlet of Caballo Dam how much water would reach the American Dam?

A. You mean with just one cubic foot?

Q. Well, take a million cubic feet, if you want to?

A. I don't have those figures.

Q. You don't have those figures?

A. No, sir. I don't know.

Q. Do you happen to know that it takes about fifty percent of the volume of water, that is, fifty percent of it wasted or lost in being transported from the Caballo Dam down to El Paso?

A. I have not checked those figures, Mr. Grambling.

Q. That doesn't sound familiar to you?

A. No, sir. I don't have those figures.

Q. Would you think that was approximately correct from your experience as an engineer with the International Boundary Commission?

A. Well, I don't know whether you are talking about simply river losses, canal losses, and all other losses.

Q. Well, any losses that occurs from the water being transported all the way down to El Paso?

A. As far as the river losses is concerned, I think that is quite high.

Q. Now, I believe you stated those expenses of this canalization and this other work you did amounted to about a million dollars, is that correct?

A. The cost of the canalization was about four million six hundred thousand dollars. The cost of rectification was five million four hundred thousand dollars.

Q. Now, Mr. Friedkin—

A. Pardon me, Mr. Grambling. I would like to clear up a point that may be helpful to the Court.

Q. Yes?

A. And that is the one you were alluding to before, whether or not the International Boundary Commission has any jurisdiction over the water in Texas, the distribution of water in Texas, and it does not.

Q. Well, that is what I wanted to hear from you. I thought you knew that.

A. Yes, sir. I didn't understand.

Q. The only one that does, since you have gotten into that question, is the State Board in Austin?

A. Right.

Q. And that is the only place anybody can get any rights to any water in Texas, isn't it?

Mr. Edwards.

We certainly object to that. Mr. Friedkin is not judging this case.

The Court:

I sustain the objection. It is still a legal question, I think.

Q. Now, was this Caballo Dam put in there by the International Boundary Commission or put in by the Reclamation Bureau, wasn't it?

A. I should have mentioned that. As a part of the Rio Grande Rectification Project, it was found in the studies and investigation leading to it, that it would be better to have flood control storage in the Caballo Dam site in connection with the rectification so as to reduce the desired capacity of the rectified project, so as a part of the rectification project there was a million and a half dollars appropriated by the Congress for the construction of a flood control reservoir at Caballo Dam site—

Q. Well, that is what we know as the Caballo Reservoir?

A. That isn't quite it. Let me finish.

Q. Thank you. Excuse me.

A. —for the construction of a glood control reservoir having a capacity of a hundred thousand acre-feet. Well, now, what was actually done is that money was turned over to the Bureau of Reclamation and the Bureau added I can't say how much money, I don't remember the figure, to make a reservoir not

only of a hundred thousand acre-feet capacity but to add to it for the purpose of making it a combination of flood control and irrigation in connection with releases from Elephant Butte, to make Caballo Dam as we see it now, of which a thousand—I mean, a hundred thousand acre-feet was paid for as a part of the rectification project.

Q. That is, by the Government?

A. By the Government.

Q. And not by the Rio Grande Project?

A. No. That was an appropriation by the Government.

Q. And at the same time they did that, when they decided they would use part of that water for that purpose, didn't they cut down the amount that the District was required to reimburse for the dam?

A. I am not familiar with that.

Q. You are not familiar with that.

A. No, sir.

Q. Well, now, how far below the Elephant Butte Dam is the Caballo Dam?

A. About 23 miles.

Q. About 23 miles?

A. Yes, sir. Mr. Resch will have to check me on that. It is about in that order.

Q. You speak about flood control. You mean there was flood waters coming in there below the dam?

A. Yes, sir. Two of the several largest arroyos which are flood producers below the Elephant Butte Dam.

Q. Was that from the Black Range?

A. Yes, sir, into the river below the Caballo site, and that was the reason it was advantageous to include flood control in Caballo as a part of the rectification project.

Q. Well, now let me ask you this, can you tell us whether or not the evaporation at Caballo lake amounts to as much as all the water that would come in from flood control that flows into that dam?

A. No, sir. I couldn't say.

Q. You haven't got the figures on that?

A. No, sir. That is really above our jurisdiction.

Q. You wouldn't know about that. Mr. Friedkin, you said in your direct testimony that you built rickrack of stone on the side of the river at points and also built levees, and I understood you to say that you built that for flood control purposes. Am I right about that?

A. Yes, sir. Flood control, and for regulation of the normal channel, normal flow.

Q. Yes, sir. And one of the purposes if I am correct, is flood control?

A. One of the purposes is flood control.

Q. Then is it true, based upon the records of the International Boundary Commission and such information that you, and others in your office, have, that from time to time they do have floods down the Rio Grande below Caballo Dam?

A. Yes, sir. There are floods in the river from time to time below Caballo Dam.

Q. And they are sufficient floods to necessitate building these levees and putting this rickrack that you told us about?

A. Yes, sir.

Q. Now, I know in the plaintiffs' pleadings or brief, Mr. Friedkin, that they have characterized this river that we now have as a Federal Canal. Is that the characteristic that the International Boundary Commission placed on it?

A. Well, that is a matter of opinion as we see it, Mr. Grambling.

Q. Well, now isn't it a fact the river as it is now constructed—channelized, and so forth—is simply the Rio Grande as it is located at the present time, isn't that your idea of it?

Mr. Edwards:
Well, again, that is a conclusion, a matter of opinion.

The Court:
Overruled.

Q. In other words, what I am trying to get at, Mr. Friedkin, is there any other river down there where the Rio Grande used to be, or in the vicinity of the Rio Grande, than this channel which has been built there by the International Boundary Commission or under its direction?

A. If I understand you, you mean whether reconstructed the channel carries Rio Grande water?

Q. Yes, sir?

A. It does.

Q. What I am trying to say is that the present Rio Grande river—

A. It forms the present Rio Grande River.

Q. That's it. It does form the present Rio Grande River. And it constitutes the international boundary between Mexico and the United States?

A. Let me correct that statement. I thought you were talking about canalization.

Q. I am talking about canalization.

A. No, sir. The canalization does not form the boundary.

Q. The rectification?

A. Yes, sir. The center of the river—

Q. The center of the river is the boundary between the two countries?

A. Yes, sir.

Q. As now rectified?

A. Yes, sir.

Q. And half of it is in Old Mexico and half of it is in the United States, is that right?

A. Yes, sir, from the center of the chanel.

Q. Now, counsel asked you about Cordova Island. I will ask you whether or not the river in the vicinity of Cordova Island constitutes the boundary between Mexico and the United States?

A. Cordova Island, if you remember the map, is sort of like this (indicating). It has a very narrow neck and then winds around and comes to a very narrow part at the river and the rectification begins right at that narrow neck, right on the downstream side.

Q. On the downstream side?

A. Yes, right where it comes back into the river.

Q. That isn't exactly it. What I am trying to say, there is a river by Cordova Island, at the narrow neck?

A. Yes, sir. It goes right by Cordova Island at the narrow part.

Q. Now, where does the river run upstream, on the upper part of Cordova Isalnd is there a river there?

A. Yes, sir.

Q. Now, that part of the river is not the boundary between the United States and Mexico?

A. There is a small section in there. Right.

Q. That does not constitute the boundary between the two countries, is that right?

A. Yes, sir. May I see that map again? (Examines same) Looks to be on the order of about half a mile.

Q. The river at that point is wholly in Mexico, isn't it?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now, Mr. Friedkin, you mentioned that there were about eight thousand acres of land involved in this rectification project, I believe?

A. That was the canalization, I believe.

Q. The canalization project. Well, then, is that productive land?

A. No, sir. Those are lands which comprise the floodway and the right of way in which the levee and the river channel is located.

Q How many acres are involved—was there additional land involved in the rectification down below El Paso?

A. Yes, sir. There was additional acreage involved there.

Q. In addition to the eight thousand you were talking about?

A. Yes, sir.

Q. Well, in some instances Old Mexico gave up acreage and when it turned up in the United States then the United States gave up acreage to old Mexico?

A. That is correct.

Q. It was kind of an off-setting process?

A. It was exactly an equal exchange of land.

Q. It was?

A. Yes.

Q. I didn't know it was.

A. 5,128 acres.

Q. On each side?

A. On each side

Q. So it didn't represent a net loss to either the United States or Mexico?

A. No, sir.

(At this point a recess was had from 10:55 AM until 11:05 AM the same day, at which time proceedings were resumed as follows, with Mr. Friedkin still on the witness stand):

Questions by Mr. Grambling: (Cont'd.)

Q. Mr. Friedkin, will you refer to that map you placed in evidence which shows the river where it runs by the City of El Paso? Exhibit 106-A, I believe it is.

A. This is it (indicating).

Q. Will you hold it up where the Court can see it?

A. Let me get acquainted with it. I didn't see this one before.

Q. This is the one you put in?

A. No, sir.

Q. Well, can you familiarize yourself with it there?

A. Yes, sir.

Q. All right, sir. There is the American Canal at that point, is that correct?

A. Yes, sir. It takes off from the American Dam at this point where the international boundary intersects.

Q. Yes, sir. I wil ask you if the Rio Grande River from this point, which you pointed out is the American Dam, and that was West of the City of El Paso at that time, was it, or North and West?

A. North and West.

Q. About how far?

A. Well, it is about three miles from the center of the city.

Q. I will ask you if the river from that point down to the tip of Cordova Isalnd—which is below the City, is it not?

A. Yes, sir.

Q. —doesn't form the boundary, the South boundary of the City of El Paso along the city limits there?

A. I can't say on that. It is the international boundary between there. As to what the limits of the city are—

Q. Well, don't you know that the city goes up to the river?

A. I don't know that that is a fact.

Q. You don't know that the city goes up to the bridge that crosses right there, the Sante Fe bridge?

A. I have seen it does but I wouldn't want to say.

Q. You won't say. That is along in that area (indicating).

A. I know it is the international boundary.

Q. Well, between those two points, Mr. Friedkin, the river was not canalized or rectified or channelized, was it?

A. No, sir.

Q. And the river, as it orginally existed, constitutes the river between the American Dam and the head of the Franklin Canal, doesn't it?

A Yes, sir. We have, through the cooperation of or with Mexico, performed some work in the channel there to improve it, but substantially it is the original river there.

Q. Whatever work was done, if any, which was very slight, you say, between the American Canal and the head of the Franklin Canal, was done by either the Republic of Mexico or the United States of America acting through the International Bounardy Commission, is that correct?

A. Yes, sir. I am quite sure that is correct. I know of no other. We have done work. I know of no other work that has been done.

Q. You don't know of anybody else doing any work like the plaintiff Water District here, do you?

A. No, sir. I don't know of any other work being done.

Q. Now, regardless of what the purpose of that American Dam and American Canal was, it did prevent Mexico from getting more than sixty million cubic feet of water per year, didn't it?

A. Sixty thousand.

Q. Sixty thousand acre-feet of water per year?

A. Yes, sir. That was the purpose of it, to control the deliveries to Mexico there of sixty thousand acre feet.

Q. Well, now, the American Dam is not a storage dam, is it?

A. No, sir. It is not.

Q. It is a diversion dam, is it not?

A. Right.

Q. And after you divert the waters which Mexico is entitled to receive, all other waters are put in the American Canal, are they not?

A. That is right.

Q. And they flow down the American Canal, which is the Rio Grande River, is that correct, for practical purposes?

A. As far as carrying water, the waters of the Rio Grande are carried in the American Canal.

Q. And the American Canal at that point constitutes the Rio Grande River?

A. No, sir. I can't say that.

Q. Well, where is the Rio Grande River?

A. The Rio Grande is in its original location paralleling and on the West side of the American Canal.

Q. Well, now, the Rio Grande River carries any excess waters, doesn't it, that the American Canal doesn't carry?

A. Yes, sir.

Q. And parallels the American Canal?

A. Yes, sir.

Q. Now, in that area between the American Canal and the head of the Franklin Canal the United States didn't acquire any lands, did they?

A. Yes, sir. It acquired rights-of-way for the American Canal.

Q. For the American Canal, but for no change of the river at that point?

A. No, sir.

Q. Now, I want to revert back a minute to this Falcon Canal that I asked you about.

The Court:
Which one is that?

Mr. Grambling:
Falcon Dam, down the Rio Grande.

The Court:
All right.

The Witness:
The dam itself is located in Starr County.

Mr. Edwards:
I don't see where the Falcon Dam has anything to do with this litigation. That is entirely separate, under a separate international treaty, not under the

treaty of 1906. It is about four hundred miles below this location.

Mr. Grambling:

The only purpose we want to show by this witness is that as far as the Falcon Dam is concerned it is on the Rio Grande. It has been the position of the plaintiff in this case that the State Board of Water Engineers of Texas has no control of the waters of the Rio Grande because it is the international boundary between Mexico and the United States, and we want to show by this witness that the International Boundary Commission supervised construction of the Falcon Dam, and they recognized and in every instance got a certificate from the Texas State Board of Water Engineers before taking a drop of water out of that Falcon Dam.

Mr. Edwards:

I challenge that statement. I don't believe it is correct in the first place. And in the second place I know it is under an entirely different treaty.

Mr. Grambling:

This is the first time I understood that Mexico could control the rights of the City of El Paso. I didn't know we were a party to that treaty.

Mr. Edwards:

An international stream certainly is controlled by international treaties, and the rights are dependent on international treaties, and that was an entirely different treaty and has nothing to do with this case. You got an entirely different law relating to the two different projects.

Mr. Grambling:

They haven't got any different state law. There is only one state law. And he says in his brief which he submitted to this Court that the Board of Water Engineers of the State of Texas has no control, absolutely none, over the waters of the Rio Grande.

Mr. Edwards:

As to this project.

Mr. Grambling:

I don't think it is limited to this project. It will have to be changed if it is limited to this project. I don't think so.

The Court:

I will overrule the objection.

Q. Now, Mr. Friedkin, that Falcon Dam down there, that was constructed under the direction of the International Boundary Commission in conjunction with the Republic of Mexico, was it not?

A. Yes, sir. It was a joint project of the United States and Mexico constructed through the International Boundary and Water Commission.

Q. Now, I will ask you if in the distribution and use of water from that Falcon Dam you recognized the necessity of getting certificates from the State Board of Water Engineers of the State of Texas?

A. Yes, sir, we do. The United States' portion of the waters released is made pursuant to orders given to us by the State Board of Water Engineers.

Q. And you recognize they have control over that water, the use of that water?

A. I don't quite get your question.

Q. I mean they have a right to determine what use that water is put to and it can only be used as authorized by the State Board of Water Engineers, as issued by a certificate from that Board?

A. Well, I presume that is the case.

Q. Well, you followed that rule?

A. What we have done—

Q. Just a minute. You followed that rule?

A. Mr. Grambling, we release water at Falcon pursuant to Water Board orders.

Q. And that is the only orders that you do release it pursuant to, isn't it?

A. That's right.

Mr. Grambling:
That's all.

On Re-Direct Examination.

Questions by Mr. Edwards:

Q. Is there any reclamation project there at Falcon?

A No, sir.

Mr. Edwards:
That is all.

Mr. Grambling:
Wait a minute. You mean Bureau of Reclamation?

Mr. Edwards:
I mean, United States Bureau of Reclamation Irrigation Project. There is none at Falcon, is there?

The Witness:
No, sir.

Mr. Edwards:
That is all.

The Court:
Wait just a minute. Let me hear from you again on the difference in the undertaking in respect to what you speak of as rectification and canalization.

The Witness:
Yes, sir. Above El Paso, where the Rio Grande is entirely within the United States for a distance of 120 miles, to what is known as Caballo Dam, we have a domestic project of the United States known as the "Rio Grande Canalization Project", and that is purely a United States project, financed by the United States Government and financed by the Congress. Downstream and below El Paso, beginning—

The Court:
Wait right there. Incidentally, does that in practical effect straighten the river to some extent?

The Witness:
Yes, sir, it does. Pardon me for not going into that. The river above El Paso was of the meandering type that it was below. in that there were not long ox-bows, it hadn't shifted there. Nevertheless, the river above El Paso did have bends in it and were inefficient insofar as carrying water, and very wide in many reaches, which made it inefficient and caused excessive losses. In order to correct that situation the canalization project called for a narrowing and confining channel. and it did straighten out such portions of the channel where it did meander to provide a reasonably straight channel.

The Court:

Well, was that canalization done by putting the levees right in the wider river beds?

The Witness:

No, sir. What we did, the levees are outside of the river beds.

The Court:

Entirely?

The Witness:

Entirely. Then there is a floodway, and there is a channel in the river. Now, the old channel was very wide and inefficient, and we have narrowed that and made it an efficient carrier of water, so the way it is there is a normal channel in the middle, a floodway where flood waters come down, and then the levees.

The Court:

The levees are out on the far edge?

The Witness:

Yes, sir. Does that clarify it?

The Court:

Yes. Well, now, the improvement or efficiency that you attribute to that, I suppose from your testimony, is the speedier delivery of water downstream?

The Witness:

Yes, sir.

The Court:

And does it reduce the loss by evaporation?

The Witness:

Yes, sir, and by transpiration of the plants along the river.

The Court:

And seepage?

The Witness:

There is also a saving from seepage because of the narrower channel.

The Court:

Well, what other gains are seen?

The Witness:

Well, those are the main gains insofar as the carrying of water is concerned except the others as authorized by the Bill, to control the waters for the delivery to Mexico of its share of sixty thousand acre feet.

The Court:

Now, the rectification, that primarily is a straightening undertaking?

The Witness:

Yes, sir, but it also includes a floodway and bounded by levees, there again, it is similar to the other. It is not wide but there's two levees; one levee is in Mexico, one in the United States, and there is a level plain, what we call the floodway, and it varies in place but generally in the center. There is a small normal channel and the boundary line runs down the middle of that center channel. Of course, the Mexican side is Mexico.

The Court:
All right. Any further questions?

Mr. Edwards:
That is all.

Mr. Grambling:
That is all.

(Witness excused.)

W. F. RESCH, was then recalled to the stand for cross-examination and testified further as follows:

On Cross Examination.

Questions by Mr. Brockmoller:

Q. Mr. Resch, do you know of any limitations of the geographical limits of the so-called Rio Grande Project?

A. The geographical limits of the project, as I know them, are the limits of El Paso County Water Improvement District Number One, the Elephant Butte Irrigation District, storage reservoirs, and the river.

Q. Now, by that, do you have a map showing those limits that you could give a metes and bounds description of the limits?

A. There was one map introduced yesterday of the El Paso County Water Improvement District Number One.

Q. What I want to know is do you have a map of the limits of the project, the geographical limits of the so-called project?

A. Well, there was another map of the Rio Grande Project that showed the limits from one end to the other.

Q. Now, Mr. Resch, in connection with that, do you say that it includes the geographical limits of the Elephant Butte District and the El Paso District, is that correct?

A. Yes, sir, as far as the irrigation features are concerned. Of course, the power system extends in several other directions.

Q. Now has that always been true, that insofar as the irrigation features are concerned, that it is limited to the district limits themselves, their geographical limits?

A. Insofar as I know, including the changes, of course, that have been made in the district limits.

Q. In other words, the so-called project limits are changeable as the districts themselves might expand or contract, is that correct?

A. No, sir, that is not correct, for this reason: The limit of land that can receive a water right has been reached, and while the districts may expand their boundaries, the irrigable area cannot be expanded further.

Q. Well, then your statement that insofar as irrigation is concerned, that the project limits were those of the districts is not correct?

A. As far as the irrigable area of the district is concerned—

Q. What I asked you was: Then your statement that the geographical limits of the irrigation project is not the geographical limits of the two districts, and—

A. I will amend that answer to state that it includes the irrigable areas.

Q. Now, Mr. Resch, in the so-called project can you tell us what the limits of irrigable land was in 1913, in acres, or lands irrigated in 1913?

A. The final irrigable limits of the project were in the process of being determined in 1913.

Q. No, sir. That isn't what I asked. What was the land irrigated in 1913 in acres?

A. I believe we entered an exhibit yesterday that gives the irrigated acreages.

Q. In 1913?

A. I am not certain whether it went back to 1913 or not.

Q. Will you refer to that exhibit?

A. May I have it?

(The witness was handed the exhibit.)

Q. I hand you here Plaintiffs' Exhibit 87-B. Is that the one you have reference to?

A. Yes, sir. This is the one, but it does not go back but to about 1915.

Q. Now, Mr. Resch, you made the statement yesterday, in connection with the Loomis filing with the Texas Board of Water Engineers, that that was filed back in 1913—I believe that is Plaintiffs' Exhibit Number 4—now, referring to that exhibit, which was introduced yesterday, on the first page there is the statement filed with the Board by L. M. Lawson, Project Manager of the United States Reclamation Service, Rio Grande Project. Now that statement, or filing, certified filing 123, refers to an exhibit attached to it, marked "Exhibit 3", a list giving as near as may be the descrption and area of the lands heretofore and now being irrigated from said canal and system, and the number and names of the water

users and consumers of water during the period. Now, would you refer to that Exhibit 3. (Part of Plaintiffs' Exhibit 4 of this record.) Exhibit 3 consists of some ten or eleven pages, and on page 11 of that Exhibit 3 what is the total acreage irrigated that is indicated there?

A. I see a figure of 11,454 on Page 11 of that exhibit.

Q. And that is the exhibit which is attached to the filing made by Mr. Lawson, one of your predecessors in the project, isn't that correct?

A. If you will refer me to the page where Mr. Lawson's name appears.

Q. I think it is right there on that page (indicating).

A. Yes, sir.

Mr. Brockmoller:

At this time I would like to read that into the record:

"County of El Paso,
State of Texas. ss.

For the purpose of information and in compliance with the provisions of Chapter 171, General Laws of the State of Texas, 33rd Regular Session of the Legislature, so far as may be, but without waiving any rights of the United States, or its successors in control of any of the works hereinafter mentioned, by reason of this compliance with said provisions, this statement is made by and on behalf of the United States of America, that is to say—

1. There is hereto attached, marked Exhibit 1, a certified copy of the statements heretofore filed for

record in the office of the County Clerk of the County of El Paso, Texas, attached to which is a true copy of the map attached to the original statement filed as aforesaid.

2. That the said 'El Paso Irrigation Canal' and system as now constructed consists of 30 miles of main canal, main headgate or intake, desaguas, checks, headgates for deliveries to laterals, drops, etc., and that all of the works have been completed. Said canal and system is now owned by the United States of America; has been by the United States altered, enlarged and repaired as shown on map hereto attached, marked Exhibit 2; and is now known as the Franklin canal and system of the Rio Grande Project.

3. That all portions of said works are in use and no part of said works is in possession of the United States and not in actual use.

4. That the amount and volume of water actually taken, diverted or used through said works is 150 second-feet, diverted through the irrigation season from February 15 to October 15 of each year whenever that amount of water is available in the river. That said water so taken and diverted is used principally for irrigation, a small portion thereof is used for domestic purposes.

5. That the amount of water that has been diverted, taken and used in each year since the acquisition and ownership of said canal by the United States, has been approximately 70,000 acre-feet per annum and the same has been diverted, taken and used for the purposes as above mentioned.

6. That there is hereto attached, marked Exhibit 3 a list giving, as near as may be, the description and area of the lands heretofore and now being irrigated from said canal and system, and the number and names of the water users and consumers of water during said period.

7. That the local address of the officer in charge of said project is L. M. Lawson, Project Manager, United States Reclamation Service, El Paso, Texas. Dated May 18, 1914.

THE UNITED STATES OF AMERICA,
By (S.) L. M. LAWSON,
Project Mtnager of U.S.R.S. Rio Grande Project, N. Mexico-Texas."

Q. And then it is sworn to by Mr. Lawson before a notary public. Now, that shows at that time that that was filed by the Project Manager on its face in connection with the general laws of the State of Texas, and refers back to the previous filing in the office of the County Clerk, which is also attached to that exhibit, is it, as Exhibit 1?

A. Exhibit 1.

Q. Yes, right here. (Indicating) Is that correct, sir?

A. Yes, sir.

Mr. Brockmoller:

At this time I would like to read Exhibit 1 into the record: (Part of Plaintiffs' Exhibit 4 of this record.)

"The State of Texas,
County of El Paso.

We the undersigned, residents of the State and County aforesaid, for ourselves and assigns, have appropriated, and do hereby appropriate out of the unappropriated waters of the Rio Grande, all of the water necessary for irrigation and domestic purposes, and for mining, milling and stock raising, along the line of our projected canal, beginning at a point hereinafter specifically described, at El Paso, El Paso County, Texas, and terminating at Fabens in said County, according to the map of J. W. Eubank, Civil Engineer, heretofore, on the 6th day of July filed 1889, (filed with the Statement of Appropriation by the undersigned, and of which this is an amendment,) in the office of the County Clerk of said El Paso County, under an Act to encourage Irrigation, etc. passed by the Legislature of Texas and approved March 19, 1889, and to be found on pages 100, 101, 102 and 103 of the General Laws of the 21st Legislature.

The purposes of this appropriation and designation are for the constructing, maintaining and operating said Canal and ditches, flumes, feeders, laterals, reservoirs and wells connected with said main line, and of conveying, transferring and furnishing water to all persons entitled to same along the line of said Canal for irrigation and domestic uses, and for mining, milling and stock raising, at such prices and in such manner and according to such system of measurement as may be determined best by our association under the said Act of the Legislature, including also the building of storage reservoirs connected with said Canal System

We therefore for ourselves and assigns aforesaid in compliance with said Act of the Legislature do hereby designate the name of said Canal to be the El Paso Irrigation Canal, the head gate of which said Canal is particularly described as follows: being in the State of Texas and County aforesaid and at a point of rock, six hundred and fifty feet up the river from the Santa Fe Railway Well in the City of El Paso, also marked by a stone mound on the said point of rock. The width of said head gate is forty feet; thence continuing said Canal along the bank of the Rio Grande in a South Easterly course, having a depth of three feet or a carrying capacity of three feet, and a width of forty feet to Eighth Street according to the map of Campbell's Addition to the City of El Paso; thence in an Easterly direction thro' said City on the most practicable route to the Eastern boundary line of said City; thence in a South Easterly direction on the most practicable route, and according to the maps of said Route marked "A" and "B" attached to the original Statement and Appropriation, filed on the 6th day of July last, to Fabens, in said County.

The undersigned further state that the width of said projected Canal is not to exceed forty feet, with the right of way, under the Act of the Legislature to purchase, claim and condemn one hundred feet in width right of way for said Canal. That the carrying capacity of said Canal is three hundred and thirty three cubic feet per second of time. That the name of the stream from which said water is taken is the Rio Grande. That the work was commenced on the . . . day of July, A. D. 1889. That the owners of said Canal are the following named persons, to wit:. A

M. Loomis, S. W. Russell, R. L. Mayer, A. Blacker, E. S. Newman, and S. G. Etheridge and said appropriators herewith adopt and confirm the appropriation and route of said Canal, heretofore made and filed as aforesaid, and file this as an amendment and re appropriation, and ask that the same be recorded as required by law.

Witness our hands this 29th day of July A. D. 1889.

A M. LOOMIS,
S. W. RUSSELL,
R. L. MAYER,
A BLACKER,
E. S. NEWMAN,
S. G. ETHERIDGE,
W. M. JAMES,
J. W. EUBANK."

Q. Then it is sworn to by them before a notary public. Now, Mr. Resch, at that time, then, according to the records of the Bureau, there were under irrigation in El Paso County some 11,000 acres, is that correct?

A. No, sir. I don't concur.

Q. You don't concur with your predecessor, Mr. Lawson?

A. Mr. Lawson, as I understand it in that instrument there, indicated that that was the land being irrigated at that time from the Franklin Canal, not the entire area in El Paso County.

Q. Do you have any other records showing that this was not the entire amount irrigated?

A. I believe in my deposition to you I provided you with some information and we gave you a figure there representing the San Elizario community, which

was separate and apart at that time from the Franklin Canal.

Q. How far is San Elizario below El Paso?

A. Oh, roughly twenty miles.

Q. Now, at that time there was being irrigated, then, in your testimony, some ten thousand acres or eleven thousand acres from the Franklin Canal, is that correct, sir?

A. Well, that is a figure in Mr. Lawson's instrument.

Q. Well, isn't that a record of your office?

A. That is the first time that I have ever seen that detailed list.

Q. That is the first time that you have had occasion to see that?

A. Yes, sir.

Q. You have never seen it before?

A. No, sir.

Q. You identified it yesterday when asked about it, and that is the first time you have seen it?

A. I don't believe I identified that yesterday.

Q. You had it referred to you on a number of occasions yesterday in the testimony, but you had never seen that before?

A. I have never seen that list.

Q. You have never seen that list before?

A. No, sir.

Q. You are the Project Manager, are you not?

A. Yes, sir.

Q. And you are the representative of the United States of America here today in this lawsuit, are you not?

A. I am a representative.

Q. You are a representative?

A. Yes, sir.

Q. Now, you are the Project Manager and these records and the matters here have come from your office, have they not?

Mr. Edwards:

Just a minute. Mr. Lawson was with the International Boundary Commission, not with the Bureau of Reclamation.

Mr. Brockmoller:

No. I beg your pardon. He was Project Manager of the Bureau when it first started.

A. To further give you information on that, Mr. Brockmoller, in my deposition I submitted to you similar records that we had received from the State Board of Water Engineers. I gave you a complete copy.

Q. Yes, and the list attached to it. That is what I am getting at.

A. That is absolutely correct. This is the first time I have ever seen that list.

Q. And you have never known of it before?

A. No, sir, except as it is mentioned in there, a list of the owners. I also noted that, but I had never seen the list before.

Q. You don't know where it came from then?

A. I would assume—Since it was prepared over Mr. Lawson's signature, I would assume that it came from the files of the Bureau of Reclamation.

Q. Now, do you have charge of the files of the Bureau of Reclamation of the Rio Grande Project?

A. Yes, sir. Unfortunately, I don't have in my possession the files that were destroyed in a fire in 1928 or '29.

Q. Well, somebody must have had this one, did they not?

A. I have no argument about that. I have never seen that list before.

Q. Now, the amount of acreage irrigated below El Paso—by that I mean the valley below the American Dam or, if you wish, the International Dam—has increased, has it not, since this list, which shows 11,000 acres?

A. Yes. There is no doubt about that.

Q. There is no doubt about that? As a matter of fact, the amount of acreage, both in the New Mexico District and in the Texas District, has from the beginning of the project, increased materially, has it not?

A. Yes, sir.

Q. And to, I believe you stated yesterday, to how many acres today?

A. In 1953 there were 159,768 acres, plus or minus, irrigated on the Rio Grande Project.

Q. Now, Mr. Resch, you know who the Texas Board of Water Engineers are, do you not?

A. Yes, sir.

Q. You have appeared before them on several occasions?

A. Yes, sir.

Q. As a representative of the United States?

A. Yes, sir.

Q. Can you tell me when the Franklin Canal heading on the Rio Grande River was abandoned, more or less, and connected to the American Canal?

A. The heading has not been abandoned. Its use has been discontinued approximately June 1st or July 1st, 1938.

Q. In other words, since that time that heading is, you might say, useless?

A. We have not used it since that date.

Q. Well, there is no water for it to take from the Rio Grande, is there, at that point?

A. It could be arranged.

Q. It could be arranged, but I am asking you, isn't it a fact that it is not used for the purposes of diverting waters from the Rio Grande and hasn't been so used since 1938?

A. That is true.

Q. Now, at the time that the Franklin Canal was attached to, or perhaps—Put it this way, the American Canal was attached to the Franklin Canal, did the Bureau, to your knowledge, and from the records in your office, make any application to the Board of Water Engineers for the State of Texas for that change?

A. Changing the diversion point?

Q. Changing the diversion point, yes.

A. We didn't change the diversion point.

Q. You take water from the American Canal, do you not?

A. Yes, sir.

Q. And you started this in 1938, is that correct, sir?

A. That is the time that the delivery of water by the Boundary Commission through the American Canal began.

Q. Yes. The point of diversion of waters from the Rio Grande were changed at that time, were they not?

A. Yes, that is true.

Q. And my question is: Did you or did you not ask the Texas Board of Water Engineers for a permit to change the diversion point at that time?

A. We didn't change the diversion point.

Q. I didn't ask you that. I am asking you if you made an application to them to change it?

A. Not having any necessity for changing the diversion point, certainly we didn't make an application.

Q. You did not?

A. No, sir.

Q. Thank you. Now, do you know where the old Elam Ditch is, or was, rather I should say?

A. From the records it was located in what we now know as the Tornillo District, which is the most easterly irrigated district of the project in El Paso County.

Q. Now the Elam Ditch did have a diversion point on the Rio Grande River, did it not?

A. Based on inspection of the records, yes, sir.

Q. And was that abandoned by the Bureau of Reclamation?

A. It was not abandoned by the Bureau of Reclamation, no, sir.

Q. It was not?

A. No, sir.

Q. You don't use it? It is not there anymore, is it?

A. No, sir. The Bureau of Reclamation never abandoned it.

Q. They never abandoned it?

A. No, sir.

Q. You are sure of that statement?

A. Yes, sir.

Q. Did you change its diversion point?

A. We constructed the diversion facilities in the Tornillo District and began to give service to all of the lands in the Tornillo District.

Q. Well, now, is the Elam Ditch Diversion point still there?

A. No, sir.

Q. Was it abandoned?

A. It must have been.

Q. Your records so show it as being abandoned, do they not?

A. Well, there is no ditch there, so the records must indicate that it was.

Q. Well, now, since that time—when did the Riverside heading into the river go in on the river?

A. The Riverside heading, as it is currently constituted, was constructed during 1927-1928 and took the place of an existing heading in the immediate vicinity.

Q. In the immediate vicinity?

A. Yes, sir.

Q. Now, can you tell me whether or not your records show that any application was made to the Board of Water Engineers for a change of that heading?

A. No, sir. I know of no such application.

Q. You know of no such permit for the change of that heading?

A. No, sir.

Q. Now, Mr. Resch, you know where Cordova Island is?

A. Res, sir.

Q. Cordova Island is an ox-bow. Is this the ox-bow that Mr. Friedkin was talking about?

A. Yes, sir.

Q. Is it under cultivation, or do you know?

A. I believe that it is.

Q. You know that it is, don't you, Mr. Resch?

A. I know that it was up to this year. I haven't inspected it this year.

Q. And is there any diversion point on the river for that Cordova Island?

A. It has been reported to me that there is a pump down there that pumps water from the river.

Q. You might call it an illegal diversion?

A. I would call it that, yes.

Q. Well, now, the water doesn't come over the Rio Grande from any ditch on the Mexican side, does it?

A. Not that I know of.

Q. Do you know how many acres are in Cordova Island?

A. Approximately 350.

Q. Approximately 350 acres of land?

A. Yes, sir.

Q. And it takes how much water generally to irrigate that amount of land?

A. Well, I don't know what the practice is on Cordova Island.

Q. Well, what is the general practice in the United States as to how many acres or acre feet of water per year it takes for the irrigation of cotton land?

A. For cotton land?

Q. Yes.

A. Oh, approximately two and a half to two and three-fourths acre feet per acre.

Q. And the El Paso Valley is more or less cotton land, is it not?

A. Yes, sir.

Q. The acreage in cotton generally exceeds all of the other types of farming that there is?

A. Yes, sir.

Q. Now, Mr. Resch, the Rio Grande River, as it winds its way up from El Paso to Caballo Dam, winds in and out of the State of New Mexico, and Texas back and forth up to the State line, does it not?

A. Well, I don't know, Mr. Brockmoller, about your expression "winds in and out".

Q. Well, sometimes it is in Texas and sometimes in New Mexico, isn't that right?

A. Yes, sir.

Q. Up to the State line up near La Tuna or Anthony, New Mexico-Texas?

A. Yes, sir.

Q. Now, Mr. Resch, the water that is used in the upper valley, that is, up beyond the pass above the American Dam, on farms comes down from canals having their diversion points in New Mexico, is that correct?

A. Yes, sir.

Q. And there is no metering of that water as it comes into Texas itself, is that correct?

A. That's correct.

Q. And you cannot give any figure on the amount of water that is used on land in Texas but above the American Dam, is that correct, except that which you charge to the farmers?

A. That is correct.

Q. Now, that which you charge to the farmers is based upon estimates of the ditchriders, is that correct?

A. Not entirely, no, sir.

Q. Not entirely? There are metering devices?

A. No, not metering devices. We have field hydrographers that use water current meters to determine the flow.

Q. Now, there is a great discrepancy in the amount of water diverted and that charged to the farmers, is there not?

A. Bound to be.

Q. Is fifty percent a good figure?

A. No. I wouldn't concur in fifty percent.

Q. You wouldn't concur in fifty percent?

A. No, sir.

Q. You think that is too high?

A. I think it is too high.

Q. Well, now—

A. Mr. Brockmoller, are we speaking of former years now and years not in this extreme critical water shortage?

Q. Well, I am asking you now, this year, last year, the year before?

A. Well, I don't have this year's yet. That is what I want to know. What period we are speaking of.

Q. Well, how about an average?

A. On an average in normal years a figure of fifty percent would be too high.

Q. How about last year?

A. I still think the figure of fifty percent would be too high as of last year.

Q. Now, does that same situation exist in the lower valley below the American Dam?

A. With respect to the measurement of water?

Q. Yes. And as to the amounts of water diverted from the river?

A. The water delivered to farms is measured in exactly the same way, yes.

The Court:

I will interrupt at this point. Mr. Marshal, recess Court now until 1:30 p.m.

(At this point a recess was had from 12:0 noon until 1:30 p.m. the same day, at which time proceedings were resumed as follows):

Mr. Brockmoller:

Q. Mr. Resch, just before lunch I was asking you about the area of the lands within the project. Is this a fair statement? Are all lands within the irrigation districts, the two irrigation districts, included in the project?

A. Theoretically that is true because the contracts are with the irrigation districts, but some of the early contracts indicate that the land to be developed is the irrigable land, but the districts, as politic bodies, are mentioned.

Q. And they have definite geographical limits, correct?

A. Yes, sir.

Q. And have those limits undergone any expansion since the beginning of the project?

A. Yes, sir.

Q. Can you tell me what the limits, that is, of lands within the project, were at the time of its inception?

A. The project at its inception is represented by the first contracts that were signed in 1906, and were for the Elephant Butte Water Users Association of New Mexico, and the El Paso County Water Improvement—no, the El Paso Valley Waters Users Association.

Q. Now, do you know how many acres were in the El Paso County Water Users Association?

A. No, sir, I don't. The project itself, when it was under investigation during 1903 and 1904 contemplated at that time the irrigation of 180,000 acres of land in New Mexico and Texas.

Q. Now, Mr. Resch, there is no definite area of land defined by any Act of Congress or by any order or directive of the Secretary of the Interior as to the number of acres of land in the Rio Grande Project, is there?

A. Well, yes, I think that there is.

Q. Well, now, let's get that straight. Do you know or do you not know?

A. I think that there was presented here yesterday an exhibit which listed the acreage that was becoming subject to repayment status in each of the irrigation districts of the project.

Q. That wasn't my question. My question, Mr. Resch, was do you know of any orders or directives of the Secretary of the Interior, or any Act of Congress which says how many acres there are to be irrigated within the Rio Grande Project?

A. Well, the Secretary's notices to me constitute an order.

Q. Now, do you know of any definite order or directive, or Act of Congress that establishes that acreage?

A. The Secretary's notices annually to the irrigation district.

Q. Annually?

A. Yes, sir.

Q. It is subject to change and revision?

A. It was changed annually.

Q. It was changed annually and it is being changed today?

A. Until the full acreage of the project came into irrigation

Q. That is what I am trying to determine. What is the full area of the project? Does it have any geographical limits or limitations upon acreage?

A. The only limits that I know of are the limits as given in the contracts between the Irrigation Districts and the United States, which specify the names of the two irrigation districts.

Q. And I believe your testimony is that the geographical limits of those two districts have, since the inception of the project, been changed a number of times upward?

A. The El Paso County Water Improvement District Number One, about 1920, absorbed the El Paso County Conservation and Reclamation District Number Two, which is at the east end of El Paso County.

Q. That is in the neighborhood of San Elizario?

A. No, sir. Geographically that extends from Fabens to the El Paso County line.

Q. From Fabens to the El Paso County line?

A. Yes, sir.

Q. Where is San Elizario with reference to Fabens?

A. Oh, perhaps ten miles northwest of Fabens.

Q. Northwest of Fabens. Now, Mr. Resch, your office operates under a budget, does it not?

A. Yes, sir.

Q. And, specifically, as to the El Paso District, is there any relationship between your budget and that district?

A. Yes, sir.

Q. Would you tell us what it is?

A. Under contract the district advances the estimated cost of operation and maintenance for the ensuing year. In preparing the budget we usually begin working on it in May of each year, and in June or July we begin discussing the budget with the Irrigation District Manager. After we have had agreement as to the amount of the budget then the irrigation district is given official notice as provided

in the contracts as to what the amount of money is that will have to be advanced for the ensuing year.

Q. To put it briefly, Mr. Resch, all of the salaries of the employees of the Rio Grande Project that have to do with the irrigation of the lands lying within the Elephant Butte District and the El Paso District, as well as all other expenses in connection with the operation of the so-called project works, including Elephant Butte Dam, is paid for by the districts to the Bureau, is that correct?

A. For the irrigation facilities?

Q. For the irrigation facilities, forgetting the power and the other unrelated items?

A. Yes, sir.

Q. Now, the Rio Grande Project, of which you are the Project Manager, is the only reclamation project operating in Texas?

A. No, sir.

Q. It is not?

A. No, sir.

Q. There are others?

A. There is a small project down here approximately 200 miles east of El Paso. It is referred to as the Balmorhea Project. It is a very small project.

Q. Very small?

A. Yes, sir.

Q. Now, you testified this morning as to the cost of Caballo Dam. No part of the cost of Caballo Dam is being repaid or is reimbursable out of the Districts, is that correct?

A. To the latter part of your question that is correct, but I don't think I testified this morning relative to that.

Q. Well, I believe you testified as to the cost of Caballo Dam. But that is correct?

A. Wasn't that Mr. Friedkin, Mr. Brockmoller?

Q. Well, it is immaterial, Mr. Resch, but that is correct, is it not?

A. The latter part of your statement is correct.

Q. That portion being that no part of the cost of Caballo Dam is chargeable to the Districts—the Irrigation Districts—is that correct?

A. As far as the construction costs is concerned, that is true.

Q. That is what I am talking about, the construction costs?

A. Yes, sir.

Q. And no part of the rectification or canalization program or the costs of construction of the American Dam is chargeable to or reimbursable by the Districts, is that correct?

A. Well, of course, that is a State Department affair. I am not conversant with their accounts.

Q. Well, do you know whether or not the districts are paying for it?

A. In general knowledge that is true.

Q. They are not paying you, are they?

A. No, sir.

Q. Under the contracts?

A. No, sir.

Q. Now, Caballo Dam, just below Elephant Butte, besides its flood control features, acts in connection with the Elephant Butte Dam for power features, does it not?

A. Yes, sir.

Q. And power is generated at Elephant Butte Dam, is that correct?

A. Yes, sir.

Q. And in your contract with the districts some four million dollars of the cost of Elephant Butte

Dam was knocked off of the charges against the irrigators for the power feature, is that correct?

A. Yes, sir.

Q. And do you know, Mr. Resch, how much money is presently owing by the farmers of the El Paso District for the construction of the Elephant Butte Dam at this time?

A. I am unable to give you from memory that figure. It is accessible, of course, in this building.

Q. But you don't know what it is at this time?

A. No, sir.

Q. Is it less than a million dollars?

A. I would hesitate to say.

Q. You don't know?

A. Without referring to the records.

Q. You do have those records available?

A. Yes, sir.

Q. Now, Mr. Resch, under your contract with the District—speaking of the El Paso District now—the El Paso District has conveyed all of their rights in waters of any kind or nature to the Bureau, is that correct?

A. For the purposes of power production.

Q. For the purposes of power production only?

A. Yes, sir.

Q. Now, in connection with this certified filing 123—Exhibit 4—which was introduced yesterday, is that filing claimed by the Bureau or by the United States Government, or by the district, or do you know?

A. Well, the one in 1914 was made by L. M. Lawson, Project Manager..

Q. Yes, but I am asking you whether it is now claimed to be owned by the United States Bureau of Reclamation or whether it is claimed to be owned by the District?

Mr. Edwards:

I think the effect of that filing is a matter of law, Your Honor.

Mr. Grambling:

He is not asking that.

Mr. Brockmoller:

I am asking who claims the ownership of it.

The Court:

I will permit the answer. Go ahead.

A. I will express an opinion on that.

Q. Well, all right. Go ahead.

A. I will express the opinion that perhaps the United States holds that water in trust for the land owners.

Q. Now, that is not in answer to my question as to who claims the ownership of it at this time.

A. Well, I am sorry, that is the only answer that I can give.

Q. Now, Mr. Resch, you are familiar with the 160-acre limitation in the Reclamation Laws, are you not?

A. In a general manner, yes, sir.

Q. In a general manner. Has the Secretary of the Interior, or any of your superiors ever requested you to have the farmers within the project get in compliance with it?

A. Yes, sir.

Q. And did you receive any answer from them?

A Yes, sir.

Q. And what did they say?

A. The program was initiated in 1950, to bring the farmers into compliance, and at the present time, under the rules and regulations as given to us, there are only three on the project that are currently not in compliance with those rules and regulations.

Q. Rules and regulations of the Secretary of the Interior?

A. Yes, sir, the Bureau of Reclamation.

Q. Now, isn't it a fact that the El Paso District Manager informed you that the El Paso District would take no steps to get in compliance with that program?

A. That is correct.

Q. And that they so passed a resolution, isn't that correct?

A. I don't recall the resolution. I do know that was the District's attitude.

Q. Now, Mr. Resch, sometime back we took your deposition in this case here and you were requested to list the owners of land in excess of 160 acres per individual. You did that, did you not?

A. Yes. sir.

Q. And this is that list here attached to your deposition there? (Indicating)

A. Yes, sir.

Q. That is your signature at the bottom of Page 2?

A. Yes, sir.

Q. And there are more than three names on that list, are there not?

A. There are more than three names on that list, yes.

Q. And each name has beside it an amount of acreage in excess of 160 acres?

A. That is correct.

Q. Some of the names are names of estates, isn't that correct?

A. Yes, sir.

Q. And some are the names of corporations?

A. Yes, sir.

Q. And the ownership of those lands are as indicated on that list, is that correct?

A. As of the date of that list.

Q. As of the date of that list, which you list here as December 31, 1951?

A. Yes, sir.

Q. And that was the latest list that you had?

A. Yes, sir.

Q. Available?

A. Yes, sir, to meet your request.

Q. Now, this was delivered to the Court Reporter here sometime in 1954?

A. Yes, sir.

Q. After this lawsuit had been filed?

A. That is correct.

Q. And, Mr. Resch, there are listed here totals at the bottom, is that correct?

A. Yes, sir.

Q. And the total amount of acreage is listed as 31,907.08 acres, that is correct, is it not?

A. Yes, sir.

Q. And underneath that you have another figure total in excess of each individual as being 17,652.39 acres of land, is that correct?

A. Yes, sir.

Q. Now, Mr. Resch, that 17,000 and some odd acres of ground that you list as in excess of each individual relates to the amount of land in single ownership, does it not?

A. In excess of 160 acres in a single ownership, yes.

Q. So that if there are some forty-six landowners listed on those two sheets, some forty-six landowners hold 17,000 some odd acres in excess of the 160-acre limitation, is that correct, in excess of 160 acres, I will put it that way?

A. Yes, sir.

Q. Now, Mr. Resch, you heard Mr. Friedkin testify this morning about the American Dam. Do you agree with his testimony concerning the same as to its storage, as to whether or not it is a storage dam or not?

A. That is correct. It is not a storage dam.

Q. It is not a storage dam?

A. That is correct.

Q. And he stated this morning that the International Boundary and Water Commission delivered water to Mexico as called for in the Treaty of 1906, and that the balance was then diverted into the American Canal, is that correct?

A. Under normal conditions. In times of flood the water has to be passed down the river that cannot be put in the American Canal.

Q. In other words, what I am getting at, there is no storage behind that dam, is there?

A. Oh, there is a very small pool.

Q. Well, if the water is not diverted the water is—

A No appreciable storage. You are correct.

Q. And it has to come into the American Canal?

A. Yes, sir.

Q. Now, yesterday you were testifying in connection with some graphs which you said had been prepared under your direction, and in conjunction with another engineer, Mr. Hill, from 1889 to 1951?

A. Yes, sir.

Q. And those graphs were prepared in connection with showing the river as it was prior to the construction of the dam and after the construction of the dam at Elephant Butte, is that correct?

A. One of those graphs.

Q. One of those graphs?

A. Yes, sir.

Q. The one I am referring to related to water in the Rio Grande here at El Paso?

A. No, sir, not that particular graph.

Q. Well, one of the graphs did refer to water here where it is measured at El Paso?

A. Yes, sir. Those graphs were prepared in this office, not collaborating with Mr. Hill.

Q. Those graphs were made solely by yourself?

A. Yes, sir.

Q. Now, the information which you put on those graphs was taken from two sources, were they not, the U. S. Geological reports and the reports and records of the International Boundary and Water Commission?

A. And some Bureau of Reclamation records.

Q. And some Bureau of Reclamation records?

A. Yes, sr.

Q. Now, you are familiar with the general yearly report put out by the International Boundary Commission, are you not?

A. Yes, sir.

Q. And they include your records as well as their own, and any other available source?

A. To some extent.

Q. They are the most complete records on the Rio Grande, excepting those early U. S. Geological reports, are they not?

A. They are water bulletins. Very good.

Q. You use them all the time?

A. When they are available. Sometimes we have to use preliminary data which is still unpublished.

Q. Now, in drawing up that particular graph you did use them?

A. Yes, sir, as well as some of their unpublished records.

Q. As well as some of their unpublished records?

A. Yes, sir.

Q. Now, Mr. Resch, is it not a fact that from 1889 until 1915 that more water passed the City of El Paso in a yearly average than there has since that time?

A. Unfortunately, I can't give you those averages because I have not worked them up on that basis.

Q. Do you know whether or not that is true or not?

A. No, sir. I do not.

Q. You do not?

A. No.

Q. Then your graph on the Rio Grande, which you submitted yesterday, in conjunction with the number of second feet and no flow on certain days, did not take into consideration the average amount of water either monthly or yearly from 1889 to 1915, and from 1915 forward to 1951?

A. It is not that type of a graph.

Q. It is not that type of a graph?

A. No, sir.

Q. It doesn't reflect then the actual amount of water?

A. Yes, sir.

Q. And you cannot tell from looking at the graph, then, whether or not there was more water before or after the dam was put into operation?

A. Not unless you undertake to average each year and then take the average of the accumulative total for the two periods that you mentioned.

Q. In other words, you do not know now whether or not there was more water in El Paso prior to the construction of the dam, Elephant Butte Dam, passing El Paso than there was after that?

A. Not without performing the computations that I just mentioned.

Q. Now, Mr. Resch, you had some graphs also at San Marcial, New Mexico, which is just above the Elephant Butte Dam, and you showed by those the cubic feet, or what was the cubic feet of water passing that point there, I believe, is that correct?

A. The graphs are plotted on the basis of mean daily cubic feet per second.

Q. And in connection with that particular graph the graph showed a decrease, did it not?

A. That is absolutely true during the past twelve years.

Q. Isn't it true all the way back to 1900?

A. No, I wouldn't say that all the way back to 1900. There was one dry period in there between 1889 and 1903, and then there were a succession of fairly good years until we reached the '30's, then we began to decrease again until we got the big years of 1941 and 1942. Since the big year of 1942 there has been a continued decrease.

Q. Is it your testimony, then, that there was no decrease before that time at San Marcial?

A. Without working up the figures I would say that I do not know at this instant.

Q. You do not know. Now, Mr. Resch, you said this morning that you knew of no land not in the two districts that were receiving so-called project water, is that correct?

A. Not within the two districts?

Q. Yes?

A. The Federal Detention Farm at La Tuna has a contract with the Irrigation Districts and the United States under which approximately 300 acres of their land outside of the boundary of the irrigation districts receive water. In addition to that the Hudspeth County Conservation and Reclamation District, under contract of December 1924, as supplemented and amended in 1951, receives what waste return flow water there is available at the end of the project.

Q. Now, are those the only two that you know of?

A. There may be in Seldon Canyon in Dona Ana County several hundred acres of land that are irrigated not from project facilities.

Q. Now, Mr. Resch, isn't it a fact that this water that goes to the Federal Prison up here at La Tuna was a straightout purchase?

A. No, it was not a purchase. If I recall that contract correctly they paid the outstanding charges on the acreage. I do not remember whether that figure was $25,000 or $36,000.

Q. Now, the Bureau of Prisons does not make an annual payment, does it?

A. Yes, sir.

Q. It does make an annual payment?

A. Yes, sir, an operation and maintenance charge.

Q. Mr. Resch, in the case of "The Hudspeth County Reclamation District against various officials of the Bureau", you were asked this question "Yes. Before we get to that let's consider this prison land. The Bureau of Prisons makes an annual payment?" And your answer was "No, sir, they paid up. I believe, it was $25,000 for a paid-up right to get water."

A. That is correct.

Q. That is correct?

A. Yes, but that does not take care of the annual operation and maintenance charge.

Q. Well, then, the answer is not correct wherein you were asked if the Bureau of Prisons makes an annual payment?

A. Is that the total question?

Q. Yes. Now, Mr. Resch, right above the City of El Paso—or, let me put it this way—Right above where the limits of the City of El Paso are, or were at the time of the filing of this lawsuit, there are several industries, are there not?

A. Yes, sir.

Q. There is the American Smelting and Refining Company?

A. Yes, sir.

Q. There is the El Paso Electric Company?

A. Yes, sir.

Q. The cement plant?

A. Yes, sir.

Q. And the McNutt Oil and Refining Company?

A. Yes.

Q. And then there are some cotton industries up there?

A. Yes, sir.

Q. Do they take or receive any water from the Rio Grande River?

A. I think that the smelter has a pump, and it has been there probably since 1880, or something like that. The cement plant has a pump. The El Paso Electric Company has a contract—

Q. With whom?

A. With the irrigation districts and the United States, to use drain water and the use of the Rio

Grande waters where there is no consumptive use thereof. Regarding the Cotton Oil Mill, there is a house located on the railroad, or immediately off the railroad right-of-way. I assume that is a pumphouse.

Q. You assume that is a pumphouse?

A. Yes, sir.

Q. You don't know that?

A. No, sir.

Q. You don't know how much water they pump out of the Rio Grande?

A. No, sir.

Q. Do you know how much water the smelter takes out of the Rio Grande by means of its pump?

A. No, sir.

Q. Or the cement plant?

A. No, sir.

Q. The only one you know anything about is the El Paso Electric Company and its contract?

A. Yes, sir.

Q. And you say they have a contract with you?

A. Yes, sir.

Q. Now, they are not engaged in irrigation, are they—the El Paso Electric Company—at the place where they take the water out of the river?

A. No, sir.

Q. And do you know how much water they use annually?

A. That is so infintesimal it couldn't be determined.

Q. So infinitesimal that it could not be determined, is that correct?

A. That is correct, the way I assess it, yes, sir.

Q. Now, the El Paso Electric Company plant is located in New Mexico, is it not?

A. Yes, sir.

Q. That is where the Texas boundary and the New Mexico boundary was in dispute for sometime?

A. Yes, sir.

Q. And there was a time when it was thought to be in Texas?

A. That is correct.

Q. And one of your contracts which were introduced here mentioned the settling of the dispute between Texas and New Mexico over their boundary, doesn't it?

A. I think that is correct.

Q. Now, did you know that the El Paso Electric Company actually uses in excess of 50,000 acre feet of water per annum in that plant?

A. I would say that it is impossible.

Q. You would say that it was impossible?

A. Yes, sir, to dissipate 50,000 acre feet of water in the generation of electricity at the El Paso Electric Company plant.

Q. Do they take all that water out by pump?

A. No.

Q. What water do they take out?

A. They pump into the plant, yes.

Q. That is what I mean: they divert by means of a pump?

A. Yes, sir.

Q. Do you have any idea of how much the cement company takes out?

A. No, sir.

Q. How long have you lived here, Mr. Resch?

A. Since 1921.

The Court

Let me interrupt here. Let us not repeat questions like that. I have heard him say he has lived here since 1921 four times already.

Mr. Brockmoller
All right, sir.

Q. You know where Cement Lake is?
A. Yes, sir.
Q. It is full of water, isn't it?
A. I haven't seen it for several years.
Q. You haven't seen it for several years?
A. No, sir.
Q. You know, of course, that that water in the Cement Lake comes from the Rio Grande, and it is pumped up there by the Cement Company?
A. That is my understanding.
Q. This morning you said you had control over that water. Now that is not quite true, is it?
A. It is not true to the extent of controlling that pump, no.
Q. The Bureau or the United States, that is, never brought any suit to stop them from using any of that water?
A. The Bureau or the United States has not. Those pumps have been the subject of discussion for recent years as to what to do relative to them.
Q. Now, do you know whether or not the McNutt Oil and Refining Company has a pump on the river?
A. No, sir, I don't. I have heard that they have one, but I have not seen it.
Q. And you have caused no investigation to be made through your office for that purpose?
A. No, sir, because it is only within the last several months that I heard that they had thrown a sand dam across a little piece of the river.
Q. That they had thrown a sand dam across the river?

A. Yes, sir, and they would not be interfering with our water in any way, because we are not getting any of that water at the present time.

Q. At the present time?

A. No, sir.

Q. In other words, you have no use for any of the water in the river at the present time?

A. We have use for it, but we are not getting it.

Q. You have use for it, but you are not getting it?

A. Yes, sir.

Q. Mr. Resch, yesterday you made a statement about a hundred second feet of water, a hundred second feet of water running throughout the day amounts to approximately 200 acre feet of water per day, does it not?

A. Yes, sir.

Q. Or approximately 72,400 acre feet of water per year?

A. Yes, sir.

Q. That hundred second feet figure that you were using in connection with the graphs was to show a little water running down the river, was it not?

A. Yes, sir.

Q. Do you know where 8th Street is in the City of El Paso?

A. Yes, sir.

Q. And you know, do you, Mr. Resch, that the canal runs down the center of 8th Street?

A. Yes, sir.

Q. I mean, of course, the Franklin Canal?

A. Yes, sir.

Q. And that it has run there for a great many years, has it not?

A. Yes, sir.

Q. Now, the street starts at about Santa Fe Street and extends—I mean the street and the canal together, the canal being on the street—extend from about Santa Fe Street on the west to approximately Cotton Avenue on the east. That's about right, isn't it?

A. Yes, sir.

Q. And that is a distance of about a mile and a half, roughly speaking? I am not trying to pin you down.

A. Yes, sir.

Q. And the street is open on either side of the canal, is it not?

A. The street?

Q. Yes, sir.

A. Yes, sir.

Q. The canal is fenced in?

A. Yes, sir.

Q. It has been fenced in since 1912 down there, hasn't it?

A. I am not conversant with the fence there in 1912. There might have been one down there, but I am not conversant with that. I am conversant with one that was constructed in 1914 and 1915.

Q. 1914 and 1915?

A. Yes, sir.

Q. There was a fence constructed around the canal at that time?

A. Yes, sir.

Q. And it was there in 1939, was it not?

A. What was left of it.

Q. What was left of it?

A. Yes, sir.

Q. Now, Mr. Resch, you are familiar, are you not, with the franchise of 1889 as amended by the franchise ordinance of 1912?

A. Yes, sir.

(At this point an instrument was marked for identification as Defendant's Exhibit Number 1 and was handed to opposing counsel for examination.)

Mr. Edwards:
No objection.

Q. You are familiar with that franchise of September 16, 1889?
A. Yes, sir.
Q. Granted to the El Paso Irrigation Company? (Indicating)
A. Yes.

(At this point another instrument was marked for identification as Defendant's Exhibit Number 2 and handed to opposing counsel for examination.)

Q. You are familiar with that franchise of 1889 and the 1913 amendment?
A. Yes, sir.
Q. Now, Mr. Resch, the 1913 amendment to the franchise of 1889 was to the United States of America, was it not?
A. The amendment of 1913? Yes, sir.
Q. And it recites, does it not, that it changes sections 1 and 4 of the original franchise ordinance?
A. Yes, sir.
Q. And the original franchise ordinance of 1889 grants a right-of-way fifty feet in width "to construct, maintain and operate a canal for irrigation through the City of El Paso," as follows, to wit: Beginning at a point of rock six hundred and fifty feet up the Rio Grande from the A.T. & S.F. Railway well, running thence southeasterly to the intersection of Eighth and Durango Streets, across all streets and

alleys crossed by said line, including Lee, Sonora, West Overland, First, Second, Third, Fourth, Fifth, Seventh, Nell, Hyde, O'Bannon, Crosby and Anthony; also right of way fifty feet wide along the Center of Eighth Street . . ." and so forth, "according to the map filed and attached to the petition presented by the El Paso Irrigation Company." Is that right, sir?

A. I think you left out Sixth Street.

Q. Left out Sixth Street? All right, including Sixth Street. Now, Section 5 of that original franchise reads as follows: "Said company shall not discriminate in the use or sale of water against the inhabitants of said City of El Paso; but the inhabitants of said city shall have the right to use the water of said canal at reasonable times, by paying therefor, at a rate not to exceed one dollar per annum per lot of 26 by 120 feet for domestic and irrigation purposes; and for all other purposes may use said water at reasonable times, paying therefor, not to exceed five cents for each one thousand cubic feet of water; and any such discrimination or overcharge shall subject said company to a forfeiture of all rights, grants, franchises, privileges and powers herein conferred." Is that the way it reads, sir?

A. Yes, sir.

Q. Now, that Section 5 was not in any wise changed by the amendment of the 11th day of December, 1913. The amendment merely changed Sections 1 and 4, did it not?

A. Yes, that's the way it reads.

Q. Section 2 of the original franchise was for a period of fifty years from the 6th day of July, 1889. That is correct, is it not?

A. Yes, sir.

Q. Now, the original franchise under Section 1 required "That said El Paso Irrigation Company shall,

whenever the City Council shall require it, cover said canal so as to make a suitable and proper roadway over said canal, and maintain bridges at such points as the council shall require, and shall maintain that portion of the streets actually occupied by the canal, in a suitable condition for travel." Isn't that correct?

A Yes, sir.

Q. And, further, "That the said El Paso Irrigation Company shall hold the city harmless in case of damages resulting from faulty construction of all bridges and highways covering said canal as aforesaid, and from any damage by reason of overflow by or from said canal." Now, that was changed, was it not, by the 1913 amendment?

A. Yes, sir.

Q. Section 1 was completely rewritten, was it not?

A. Yes, sir.

Q. Now, you are familiar with that franchise, and you state that in 1914 or 1915 there was a fence along the Franklin Canal, is that correct?

A. Yes, sir.

Q. That fence was difficult of being maintained, was it not?

A. Yes, sir.

Q. You testified in your deposition that it was hard to maintain and wasn't the kind of fence that you liked to maintain?

A. It was a difficult type of fence to maintain.

Q. But it had been maintained by the project, so far as you know, from 1914 to 1939?

A. Not exactly.

Q. What do you mean "not exactly"?

A. We couldn't keep up with the maintenance to the fence due to vandalism.

Q. You needed a new fence?

A. We needed a fence.

Q. Now, that canal along 8th Street was never covered, was it?

A. No, sir.

Q. It is still there?

A. Yes, sir.

Q. Now, do you have any idea of how much money it cost the Bureau to maintain that fence from 1914 or '15 to 1939?

A. No, sir. Our accounts does not permit that determination.

Q. Would it be a large amount or a small amount?

A. I don't know.

Q. You don't know how much it is?

A. No, sir.

Q. But there was a difficulty of maintenance due to vandalism?

A. Yes, sir.

Q. You still have that trouble now?

A. Yes, sir.

Q. People cutting holes in it?

A. Yes, and under it.

Q. You still have the same troubles today?

A. Yes, but not to the extent that we had with the old type fence.

Q. There has been some progress made with the types of fences since that time?

A. Either that or the vandalism has decreased.

Q. Now, Mr. Resch, you made an interesting statement this morning. You stated that the United States acquired the Franklin Canal in 1912, is that correct?

A. That is my interpretation of the quitclaim deed.

Q. Well, which quitclaim deed are you referring to?

A. The one from the Franklin Irrigation Company of October, 1912, if my memory serves me correctly.

Q. Is it your testimony, then, that you have had the Franklin Canal since that time?

A. Yes, sir.

Q. Then all of this hullabaloo about the ordinance and quitclaim deed of 1939 don't mean anything, is that right?

A. No, sir. It means a great deal, quite a great deal.

Q. If you already owned the canal, what could you get from getting another deed to it?

A. We owned the canal. There might have been some question as to title with respect to street crossings. We purchased the interest of the irrigation company.

Q. You purchased the interest of the irrigation company?

A. Yes, sir.

Q. And there was a franchise covering their interests, was there not?

A. Yes, sir.

Q. Which was assigned to you by that amendment of 1913 there?

A. Yes, sir.

Mr. Brockmoller:
I would like to introduce these in evidence.

Mr. Edwards:
No objection.

Defendant's Exhibit 1, having been received in evidence, reads in words and figures as follows:

"D-1".

(Ordinance Dated September 16, 1889.)

An Ordinance Granting Right of Way to the El Paso Irrigation Company.

Be It Ordained By The City Council of the City of El Paso:

Section 1. That right of way fifty feet in width is hereby granted to the El Paso Irrigation Company to construct, maintain and operate a canal for irrigation through the City of El Paso, as follows, to wit: Beginning at a point of rock six hundred and fifty feet up the Rio Grande from the A.T. & S.F.Railway well, running thence southeasterly to the intersection of Eighth and Durango Streets, across all streets and alleys crossed by said line, including Lee, Sonora, West Overland, First, Second, Third, Fourth, Fifth, Sixth, Seventh, Nell, Hyde, O'Bannon, Crosby and Anthony; also right of way fifty feet wide along the Center of Eighth Street from its intersection with Durango Street to its intersection with Cotton Avenue; according to the map filed with, and attached to the petition presented by the El Paso Irrigation Company: provided, that said El Paso Irrigation Company shall, whenever the City Council shall require it, cover said canal so as to make a suitable and proper roadway over said canal, and maintain bridges at such points as the council shall require, and shall maintain that portion of the streets actually occupied by the canal, in a suitable condition for travel: That the said El Paso Irrigation Company shall hold the city harmless in case of damages resulting from faulty construction of all bridges and

highways covering said canal as aforesaid, and from any damage by reason of overflow by or from said canal.

Section II. The rights, grants, franchises, privileges, powers and authority herein granted shall continue for the period of fifty years from the sixth day of July, A. D. 1889

Section III. Said company shall in good faith commence work on the construction of its canal for irrigation, within ninety days from and after the approval of this ordinance by the Mayor, and shall have the same completed through the city limits within six months from and after the date of the approval of this ordinance by the Mayor. In the event the said company shall fail, neglect or refuse to commence said work, or complete said work within the time specified, this ordinance shall become of non-effect and void, and all the rights, privileges and franchises herein granted shall, ipso facto, be forfeited.

Section IV. Should the said company fail, neglect or refuse to operate said irrigation canal, or should the said company allow said canal to remain dry when there is water in the river, for the space of three continuous months, the City Council reserves to itself the right to forfeit and cancel all rights privileges and franchises herein granted.

Section V. Said company shall not discriminate in the use or sale of water against the inhabitants of said City of El Paso; but the inhabitants of said city shall have the right to use the water of said

canal at reasonable times, by paying therefor, at a rate not to exceed one dollar per annum per lot of 26 by 120 feet for domestic and irrigation purposes; and for all other purposes may use said water at reasonable times, paying therefor, not to exceed five cents for each one thousand cubic feet of water; and any such discrimination or overcharge shall subject said company to a forfeiture of all rights, grants, franchises, privileges and powers herein conferred.

Section VI. This ordinance shall take effect from and after its passage and publication, which publication shall be at the expense of the El Paso Irrigation Company.

On motion of Alderman Kitchen the franchise shall begin on the sixth day of July, 1889.

On moion of Aldrman Merrick the company was required to begin work within ninety days.

On motion of Alderman Kelly the company was required to complete the canal within six months.

On motion of Alderman Merrick the Ordinance, as amended, was adopted.

On motion of Alderman Solomon the Council adjourned until to Wednesday, September 18th at 7:30 p.m.

(S.) G. E. BOVES.
City Clerk.

Approved:
(S.) RICHARD CAPLES.
Mayor.

11/13/54.

A true and correct copy, I do hereby certify:
(S.) J. M. HERRERA,
City Clerk.

Defendant's Exhibit 2, having been received in evidence, reads in words and figures as follows:

"D-2".

Amendment of Ordinance.

Clerk read ordinance amending sections 1 and 4 of franchise Ordinance granted September 16, 1889, to El Paso Irrigation Company. Motion was duly made and seconded to adopt the ordinance. The Mayor ordered the vote upon the adoption of the ordinance to be taken by roll call, which when taken resulted as follows: Yeas, Calyton, Hewitt, Leavell and Levy. Nays, None. Absent None. Thereupon Mayor Kelly declared that all of the vote of the City Council having been cast in favor of the adoption of the ordinance the same be and is hereby adopted. The ordinance above referred to is in words and figures as follows, to-wit:

Be it ordained by the City Council of the City of El Paso: That Section 1 and Section 4 of an ordinance passed and approved the 16th day of September, 1889, recorded in Book "F", page 41, granting to El Paso Irrigation Company certain rights and privileges be amended so as to hereafter read as follows:

Section 1. Right of way 50 feet in width is hereby granted to the United States of America assignee and successor of El Paso Irrigation Company, their

successors and assigns, to construct, operate and maintain a canal for irrigation through the City of El Paso as follows:

Beginning at a point of rock 650 feet up the Rio Grande from the AT. & S.F. Railway well; running thence southeasterly to the intersection of Eighth and Leon Streets across all streets and alleys crossed by said line, including Lea, Sonora, West Overland, First, Second, Third, Fourth, Fifth, Sixth, Seventh, Nell, Hyde, O'Bannon, Crosby, Anthony and Durango; also right of way 25 feet wide along the center of Eighth Street from its intersection with the west line of Leon Street; thence in an easterly direction along Eighth Street 7200 feet to where said irrigation canal takes a northerly course and leaves Eighth Street; said point being designated as Station 150 according to Doyle's Survey made by the Reclamation Service; provided that the United States of America, their successors or assigns shall concrete-line said canal on Eighth Street and shall erect iron railings on each side of said canal the whole length of Eighth Street, said railing to be erected in accordance with plans hereto attached and made a part hereof, and shall construct, erect and maintain bridges at the points and of the dimensions and on the streets hereinafter set forth.

Concrete bridge on Santa Fe Street to be 70 feet wide; concrete bridge on El Paso Street to be 32 feet wide; concrete bridge on Broadway to be 32 feet wide; concrete bridge on Stanton Street to be 70 feet wide; concrete bridge on Kansas Street to be 32 feet wide; concrete bridge on Campbell Street to be 70 feet wide; concrete bridge on Florence

Street to be 32 feet wide; concrete bridge on Virginia Street to be 32 feet wide; concrete bridge on St. Vrain Street to be 32 feet wide; steel or concrete bridge on Ochoa Street to be 20 feet wide; steel or concrete bridge on Park Street to be 32 feet wide; steel bridge on Hill Street to be 24 feet wide; steel bridge on Tays Street to be 24 feet wide; and shall erect and maintain and replace all bridges east of Cotton Avenue with steel or concrete bridges to be 20 feet wide, and bridges on such other streets as the Council may require; provided, however, that no bridges shall be erected with wooden flooring; the roadway of all bridges to be of asphalt. All the bridges, railing, and the concrete lining of said canal on Eighth Street to be of a substantial character and all materials to be of first class quality and to be erected in a good workmanlike manner and to be completed within four months from the date hereof and to be on grade established by the City.

Also right of way 50 feet wide, commencing at point 7200 feet easterly of Leon Street along Eighth Street, is hereby granted to said United States of America, their successors and assigns, to cross, intersect and pass along any street or alley from said point to the City limits of said city.

That said United States of America, their successors or assigns shall hold the City harmless in case of damages resulting from faulty construction of said canal, bridges or fences, and from any damage by reason of overflow by or from said canal.

Section 4. Should the United States of America, their successors or assigns allow said canal to re-

main dry when there is water in the reservoir available for distribution, for a space of four continuous months, the City Council reserves to itself the right to forfeit and cancel all rights, privileges and franchises herein granted.

Passed and approved, this 11th day of December, A. D. 1913.

C E. KELLY.
(Seal) Mayor.

Attest:
C. W. FASSETT,
City Clerk.

11/13/54.

A true and correct copy, I do hereby certify
(S.) J. M. HERRERA.
City Clerk.

Questions by Mr. Brockmoller (continued):

Q. Then, Mr. Resch, it is your testimony, simply, that in 1939 you may have acquired some interests to the streets of the City of El Paso, is that right?

A. That is my interpretation of the ordinance and the quitclaim deed.

Q. And you have read them both?

A. Not recently. I have read them in the past.

Q. You heard it read here yesterday?

A. Yes. I think it was read here yesterday.

Q. Now, Mr. Resch, while you were on the witness stand this morning you were handed a number of exhibits by Mr. Edwards, consisting of a whole series of pictures that you had taken up and down the Rio Grande River.

A. No, sir.

Q. Perhaps yesterday?

A. Not that I had taken.

Q. Well, I believe you said they had been taken under your direction?

A. Well, either in my presence or my request.

Q. Or your request?

A. Yes, sir.

Q. And you identified what the pictures were?

A. Yes, sir.

Q. Now, those pictures were all dated; if I recall correctly, in October and September of the year, or in March of the year in which they were taken?

A. Yes, sir.

Q. Now, those in March were taken before releases were made from Elephant Butte Dam, and the others after releases had been closed down, or I mean no further releases had ben made?

A. Before releases from Caballo Dam.

Q. Releases from Caballo Dam?

A. Yes, sir.

Q. And after releases had been shut off, those taken in September and October?

A. Yes, sir.

Q. I believe you so testified?

A. Yes, sir.

Q. In other words, all of those pictures of any of the structures, then, below Caballo Dam you couldn't expect to find any water in the river in any of them, excepting perhaps some return flow, which some of the pictures showed in the vicinity of El Paso?

A. Under the conditions existing at that time, that is true.

Q. Well, now, Mr. Resch, there is not going to be any water immediately below Caballo Dam when

you shut the water off. There would not be any water in the river immediately below Caballo Dam, would there?

A. There is a certain amount of ground water excretion that reaches the river.

Q. What do you mean by ground water excretion?

A. Ground water from the ground water table that releases itself to the bed of the river.

Q. In other words, the ground water in irrigated lands will find its way to the river in some proportion to the amount of water which is being placed upon the land, won't it? Either by irrigation or by precipitation?

A. No, not under all conditions.

Q. Not under all conditions?

A. No.

Q. But you made a statement a moment ago that there would be some water excretion sometimes there below Caballo?

A. Yes, sir.

Q. Now, there has been a drought in the past two years, so you couldn't expect any ground water excretion?

A. Now, immediately below Caballo Dam there was.

Q. The point I am trying to make, simply, Mr. Resch, is that the pictures were taken while no water was being released from Caballo?

A. That is correct.

Q. And normally if there is any water it would be very little in the river at all?

A. Not under normal conditions.

Q. Not under normal conditions? Do you have any records indicating how much there would be under normal conditions in the river after it is shut down at Caballo?

A. At what point?

Q. Well, the average flow between Caballo and El Paso measured at El Paso.

A. At El Paso in past years, during the month of January, which is accepted as the low month of the year, the river rarely ever dropped below 150 cubic feet per second.

Q. Now, when was the last time—What was the last normai condition of flow at El Paso, I mean this ground water excretion, after it had been shut off at Caballo?

A Oh, perhaps 1949 and 1950.

Q. 1949 and 1950?

A. Yes, sir.

Q. Mr. Resch, in the El Paso District there are only two diversion points for the El Paso District, one at the American Canal into the Franklin Canal and the other is presently at the Riverside heading, is that correct?

A. Well, those are the two points at which the project puts its water into the Franklin Canal or the American Canal and the Riverside Canal, the water that is then in transit from storage.

Q. I am just asking if those aren't the two diversion points here in the El Paso District below El Paso, that is, below the American Dam?

A. Well, those are the only two points that I know of from which water can be introduced into a canal from the bed of the river at the localities that you mentioned.

Q. Now, Mr. Resch, you stated that the normal release from Elephant Butte Dam was 780,000 acre feet per annum. You estimated that for the period of years beginning back in 1915?

A. Yes.

Q. Beginning back in 1915 to the present time, you estimated that that was the release from Elephant Butte?

A. Yes, sir.

Q. And that water is released there by whom? By the Bureau?

A. By the Bureau, yes.

Q. And that is the water that is used in connection with the two irrigation districts, the irrigation of their land—

A. And the Mexican Treaty water of 1906.

Q. Of 60,000 acre feet measured here in El Paso?

A. Yes, sir.

Q. And I believe you stated that the water was used four or five times over in irrigation, is that correct?

A. A portion of those waters are used five times.

Q. Just a portion of that?

A. Yes, sir.

Q. You wish to correct your statement?

A. To that extent.

Q. How much of the 740,000 acre feet, what proportion is used four or five times over?

A. That cannot be estimated at this time. That would require extensive study, and a partial answer, the water at El Paso is made up of approximately, on a year's basis, of 30 percent project return-flow waters coming back from the project drains and the release of water from the Caballo Reservoir. Now, I would like to emphasize that that figure of 30 percent is a mental calculation that I am making at this time.

Q. Now, would you say, roughly then, that 30 percent of the 740,000 acre feet of water is used five times?

A. No, sir. I would not at the present time state any figure.

Q. Can you tell us what percentage is used four or five times?

A. No, sir. I would not at the present time undertake to quote percentages.

Q. Well, now, you say here that 70 percent is water released from Caballo here at El Paso, is that right?

A. That is my estimate.

Q. The other 30 percent of project return flow, as you call it, is also water which has been released from Caballo, has it not?

A. To a great extent, yes.

Q. To a great extent. And it is water which is used by the farmers in irrigation and which, by ground excretion, or by means of drains, finds its way back to the river?

A. Yes, through artificial channels.

Q. You mean there is no ground excretion?

A. The artificial channels are the drains that have been constructed and for which the water users are paying, in order to prevent the seeping and the water-logging of the land, and it is that water that is returned to the river and used and re-used through the project.

Q. The question was: Was there any ground excretion to the river?

A. Well, return-flow of water has at one time been ground water

Q. In other words, the drains merely hasten the ground excretion pretty much and lower the water table under the farm lands somewhat, is that right?

A. Yes, sir, that is the way it works.

Q. That is the purpose of it, is it not?

A. Yes, to prevent the water-logging and the seeping of the land.

Q. And to prevent the excretion to the river and to hasten its return to the river?

A. To hasten its return to the river and to prevent seeping and water-logging.

Q. Now, do you have any knowledge of the amount of water that the City of El Paso uses at the present time in a year's period measured in acre feet?

A. The total used by the City?

Q. Yes?

A. I saw the figures on pumpage that Mayor Hervey submitted and we, of course, have the records of the water treatment plant. Now, one set of figures was expressed in thousand gallon units, and the other figures expressed in acre feet. So, from the standpoint that I have made no computations to express them in the same unit, I would say or have to say that I don't know at this time. I have, in past years, known what the City usage was.

Q. But you don't know what it is at the present time, or was for last year, or the year before?

A. No, sir.

Q. Now, Mr. Resch, on direct examination you testified that in the year 1953 there were 66,646 acres of land—

A. Did I say "46"? I think I should have said, 66,664.

Q. That is what you said. Excuse me. And of those you estimated that 10,700 were in El Paso above the American Dam, that is, in El Paso County?

A. Yes, sir, 10,637.

Q. Leaving some, roughly, 56,027 acres below El Paso?

A. Yes, sir.

Q. Now, how many water users are there in the El Paso District, if you know?

A. Oh, I will have to make a wild estimate on that. I would say that perhaps between 8,000 and 10,000 individual accounts.

Q. Didn't you make a count of them back in 1954 or in March, rather, of this year?

A. I don't recall that we made an actual count. It is possible at least that I might have obtained the figure from the Irrigation District and used it.

Q. Now, you deliver the water to those accounts, do you not?

A. No, sir, not to all of the accounts.

Q. Not to all of the accounts?

A. No, sir, a great many of the accounts are located on community districts and we deliver the water to the head of the community ditch.

Q. You deliver the water to the head of the community ditch?

A. Yes, sir.

Q. Who do you charge for the water?

A. Sir?

Q. How do you determine who is to pay for the water when you deliver it to the community ditch?

A. The people in the community ditches, under the district rate schedule, have a specified rate that they pay. We give them usually so many hours to irrigate.

Q. Well, the district doesn't know who has gotten any water until you tell them, do they?

A. That type of an account is carried on the district books as what you call a "flat account."

Q. Is it a flat account for domestic use?

A. No, for irrigation use.

Q. For irrigation?

A. Yes, sir.

Q. How many actual farmers are there in the El Paso District who farm five acres or over, Mr. Resch, do you know?

A. That table we did work up. I don't recall the figure exactly. If you desire me to make a rough estimate I will say perhaps 2500 to 3000, and, again, I use that figure advisedly.

Q. You made those computations about March of this year. About 2900 would that be right, about 2900 people farming five acres or more, is that correct?

A. Well, that comes within my estimate, yes, sir.

Q. Now, the balance of the accounts of approximately 8,000 are made up of cityfied homes, or urban development in the valley, who use water to irrigate lawns?

A. Lawns and gardens.

Q. Lawns and gardens?

A. Yes, sir.

Q. As some of the people within the city limits themselves, is that right?

A. I didn't understand your question.

Q. Well, similar to those people in the city who water their lawns and gardens?

A. Well, some of those areas are in the city.

Q. Some of those areas are within the city limits?

A. Yes, sir.

Q. Then there are lands within the limits of the city which are so-called project lands?

A. Yes, sir.

Q. Is that true as of October 1st of this year?

A. Yes, sir.

Q. Excuse me. As of October 1952?

A. Well, now, that might involve the extension of the city limits.

Q. Yes, it does. I am trying to get back before the limits were expanded, at the time of the filing of this suit.

A. Well, the city limits in 1952 on the eastern side of the town, where were they?

Q. Right below Ascarate Park.

A. Below Ascarate Park?

Q. Take it back to Ascarate Park, including Ascarate Park.

A. Including Ascarate Park?

Q. Yes.

A. Well, there are lands in portions of Ascarate Park that are irrigated.

Q. And on the east city limits just above the International Dam, I believe—On the west, I mean, just above the International Dam?

A. Yes, sir.

Q. And you say there were lands then within the city limits included within the so-called project?

A. In the Ascarate District.

Q. In the Ascarate District. Of course, since that time the city has expanded quite a bit westward and there are lands now within the city limits which were within the project or so-called project lands?

A. Yes, sir, the so-called Country Club district.

Q. The point I am trying to make is, Mr. Resch, that there has been a great deal of sub-division work in the upper and lower valleys in the past since the war period?

A. Yes, sir.

Q. And the farms, farm lands rather, have been laid out into sub-division for homes?

A. Yes, sir.

Q. And it is estimated that there are some 30,000 homes which were previously on farm lands located within those areas, isn't that correct?

A. There are a lot of them.

Q. There are lot of them and they are still growing?

A. Yes, sir.

Q. And they are not farmers by any manner of means?

A. Well, there are some farmers among them.

Q. And it has been estimated that over four thousand acres of land have been taken out of cultivation since 1945 by the construction of roads, schools, and shopping centers alone in those areas, isn't that correct?

A. I think that I discussed that figure with you once before.

Q. No, sir. Is that correct, though?

A. Well, I am not certain about the four thousand. It is true that quite an acreage has gone from farm land into business districts and home sites, and so forth.

Q. Now, some six thousand of the accounts represent residences, isn't that correct?

A. I would rather not answer that. I am not overly conversant with those figures at this time.

Q. Now, Mr. Resch, you made the statement earlier that the water was appurtenant—I believe you used that phrase—or went with the land, the project water?

A. Appurtenant to the land.

Q. Is that correct?

A. Yes, sir.

Q. Does that mean that the water belongs to that particular land?

A. It belongs to that piece of land after it has been assigned the water right and as long as it has such a water right.

Q. Now, can't that water be transferred to somewhere else?

A. Yes, sir, I understand that it is transferred at times.

Q. Well, you understand that it is? You are controlling this water, are you not, Mr. Resch?

A. The water?

Q. Yes?

A. Yes, sir.

Q. And are you transferring it from the piece of ground where you say it is appurtenant to another piece of ground?

A. No, sir, we are not doing that.

Q. You are not doing that?

A. No, sir.

Q. You were delivering it to the land itself?

A. We are delivering it to the land for which we receive contract authorizations from the irrigation districts.

Q The district then tells you where to deliver the water?

A. In effect that is true.

Q. Whether the water is delivered to lands with water rights, you don't check into that?

A. Will you re-state that last, please?

Q. I say you do not check into it to determine whether or not the particular land which the Bureau tells you to deliver to has water rights, as you put it?

A. Oh, we maintain the land classification records for the irrigation district.

Q. So you do know where the water is going?

A. Yes, sir.

Q. And you deliver it only to those lands that have so-called water rights?

A. Under the allotment program that is true.

Q. And what they do with it after they get it you make no inquiry about?

A. No, sir.

Q. Now, as to these six thousand accounts, more or less, which are residential in nature, you say you deliver those to a community ditch?

A. To the head of the ditch. We advise them, based on the acreage, that they can have water for a certain number of hours.

Q. Now, what happens to the water which was appurtenant to the some four thousand acres of the land occupied by streets, roads, schools, and shopping centers?

A. Such land, where contracts are not given by the irrigation districts, in effect their water is available for the allotment pool, or the lands that have that water right can transfer, with the approval of the irrigation district, the water appurtenant to that land for that particular year to another tract of land.

Q. You permit it, then, to be transferred, as you call it, to another land that has no so-called water rights, is that true?

A. I will have to answer that in this manner: I don't recall whether the irrigation district has approved the transfer from water right to suspended land where the ownership is different. I do not say that it isn't done.

Q. Isn't that what is called "excess waters" and is delivered to other land, or, as we say, the water is sold to someone else?

A. Excess waters?

Q. Yes.

A. No, sir, I don't understand that term as defined.

Q. But that water is transferred to other lands?

A. Where the owner so desires it to be transferred and the irrigation district approves it.

Q. And you don't know what lands that water is transferred to?

A. No, I don't. That transfer is made from the irrigation district office or in our field office. I have no occasion to review those individual transfers.

Q. Well, then, how would your office know where to deliver the water?

A. The irrigation district issues an authorization.

Q. And you just deliver it where they tell you?

A. No, sir, a copy of that authorization goes to our field office and the field office then advises the ditch-rider that such and such a tract has been authorized to receive water. If there is any transfer of water from one account to the other our field office and the water records in the field office make such a transfer.

Q. Mr. Resch, digressing for a moment, was any permit secured by the Bureau of Reclamation from the State Board of Water Engineers for Rio Grande waters delivered to the Federal Prison at La Tuna to your knowldge?

A. No, not to my knowledge.

Q. Not to your knowledge?

A. No, sir.

Q. The water that goes up to that farm is from the Rio Grande, is it not?

A. Yes, it is Rio Grande Project water.

Q. The question was whether it was from the Rio Grande?

A. No. It does not go up there from the Rio Grande. It goes up there from one of the laterals.

Q. Which is fed by waters from the Rio Grande?

A. Fed by waters from the Caballo and Elephant Butte reservoirs.

Q. From the Rio Grande?

A. As conveyed by the Rio Grande.

Q. You would like to stick by that conveyance down the Rio Grande?

A. Yes, sir.

Q. The Rio Grande is a river, isn't it, Mr. Resch?

A. I doubt it.

Q. You doubt that and yet in this lawsuit by the United States of America, of which you are a representative, you claim it is a navigable stream, isn't that true?

A. It hasn't been navigable during this period of drought.

Q. The United State claims it is a navigable stream does it not?

A. I can't speak for the United States.

Q. You are their representative here today?

A. I am a representative of the United States.

Q And you were present at the time the pleadings were drawn up, were you not, and the conferences?

A. I attended conferences. I do not think I was present when the final instruments were drawn up.

Q. Now, Mr. Resch, you said you did not know the actual amount of acreage being irrigated in 1913 in the El Paso District, is that correct?

A. No, sir, I do not know the actual irrigated acreage that was irrigated in 1913.

Q. And I believe you further stated that there were no definite geographical metes and bounds descriptions to the project itself, is that correct?

A. Except as they are reflected by the contracts which spell out the names of the irrigation districts.

Q. Now, I will ask you this question, to be more specific, is there to your knowledge any defined geographical limits of the project, that portion of the project which is within the State of Texas?

The Court:
Haven't you asked him that question?

Mr. Brockmoller:
No, sir, not that specific question, Your Honor. If I did I don't recall it.

The Court:
Well, you have asked him a number of questions whether there was any written definition of the geographical bounds of this, that, and the other. I thought what you asked would cover this, but if you think not I will let him answer.

A. The El Paso County Water Improvement District Number One is named in the contracts with the United States.

Q. The question was, Mr. Resch, the project in Texas, does it have any defined geographical limits, a metes and bounds description?

A. The contracts with the United States include El Paso County Water Improvement District Number One, and there are metes and bounds descriptions of the El Paso County Water Improvement District Number One.

Q. Yes, I realize the El Paso County Water Improvement District has its geographical limits, but does the project? That portion which lies in Texas, do you know of any definite metes and bounds description of the project in Texas?

A. Again, Mr. Brockmoller, the only way I know to answer that is that I know the project is conterminous as expressed in the contracts with the United States, the Elephant Butte Irrigation District

and the El Paso County Water Improvement District Number One.

Q. Then, is it a fair statement that the project in Texas is conterminous with the limits of the El Paso County Water Improvement District Number One?

A. Yes. Now, I want to point out there that you questioned me about that once before and I stated to you that all of the lands in the El Paso County Water Improvement District Number One are not subject to irrigable classification and that the activities of the Bureau of Reclamation would, therefore, be confined to that portion of the district that is irrigable.

Q. Now, do you know how much less ground then in acreage within the El Paso District is not irrigable?

A. The gross area of the District is about 89,675 acres. The irrigable area of the District in 1953 was 75,934 acres.

Q. And how much actually irrigated in 1953?

A. And irrigated in 1953, 66,664 acres.

Q. And how much of that irrigated is represented by residences and non-farming land?

A. Well, I don't know exactly. I think you mentioned two figures a moment ago, 4,000 and 6,000, but I don't know exactly.

Q. You keep no records of that?

A. We could determine it from the classification books of the district. I might point out that there are about 9,000 sheets in those books.

Q. Now, Mr. Resch, going back to the photographs which you were asked to identify, you included a group of pictures of structures and matters above Eelphant Butte Dam?

A. Yes, sir.

Q. And are those structures above Elephant Butte Dam a part of the Rio Grande Reclamation Project?

A. No, sir.

Q. And they were not paid for by the Rio Grande Reclamation Project, I mean reimburseable by the farmers within the two districts in any way, shape, form or fashion?

A. That is correct.

Q. Now, Mr. Resch, is it not a fact that above San Marcial, New Mexico that there is under cultivation an area of ground in excess of a half million acres, in New Mexico?

A. In New Mexico?

Q. Yes?

A. On the Rio Grande?

Q. Yes?

A. No, sir.

Q. There is not?

A. No, indeed.

Q. Well, perhaps is there as much as a half a million acres under cultivation above San Marcial, New Mexico on the Rio Grande?

A. Yes, sir.

Q. Extending up into Lower Colorado?

A. Into Colorado.

Q. And can you tell me how many acres were in cultivation above San Marcial in 1920?

A. In 1920?

Q. Yes?

A. No, sir. I am sorry, but without referring to records.

Q. Isn't it a fact, Mr. Resch, that since the construction of the Elephant Butte Dam that there has been an increase in irrigated lands above Elephant Butte Dam on the Rio Grande from approximately 100,000 acres to as high as 700,000 acres?

A. Since the construction of the Elephant Butte Dam?

Q. Yes.

A. No, sir, not as high as 700,000.

Q. You mean there never has been a figure that high?

A. Not an increase since 1915.

Q. I didn't say an increase. I said ranging from 100,000 up to that high.

A. 700,000?

Q. Yes.

A. As I said, there has not been an increase of 700,000.

Q. But the question was hasn't there been since 1920 an increase up to 700,000 above San Marcial?

A. Without consulting the record I would be unable to answer that.

(At this point a recess was had from 3:10 p.m. until 3:20 p.m. the same day, at which time proceedings were resumed as follows):

Q. Mr. Resch, you were being questioned about the contracts of 1941, and 1944, and 1949, this morning. Is it your position, the Bureau of Reclamation, that the City may not take any water from the river excepting under the terms of those contracts?

A. That is true.

Q. Is it the position of the United States, the Bureau of Reclamation, that the Rio Grande River is a part of the so-called project works, and that the City must pay the Reclamation Department, through the districts, under those contracts for transporting water from the river?

A. You are taking in more territory there than I can cover in my answer. I can't speak for the United States.

Q. The Bureau of Reclamation then?

A. The Bureau of Reclamation has taken the position that the water available to the City of El Paso is covered by those contracts.

Q. Well, is it the position of the Bureau that the Rio Grande River is a part of the project works?

A. The Rio Grande River must be considered as a part of the project works in that we use the Rio Grande water to convey our waters.

Q. Then it is your testimony that the Bureau of Reclamation states that the Rio Grande River, that is, from Caballo Dam to Fort Quitman is a part of the project works?

A. No, sir.

Mr. Grambling:

What was your answer, Mr. Resch?

The Witness

No, sir.

Q. You do not so consider it?

A. The answer is "no" to your question.

Q. Well, then, put it this way: Is it the position of the Bureau of Reclamation that the Rio Grande River from Caballo Dam to the City of El Paso at the American Dam is a part of the project works?

A. The only way I can answer that is to say that we have always considered that we operated the river.

Q. You can answer the question, can't you? Is it the position of the Bureau that the Rio Grande River,

from Caballo Dam to the American Dam, is or is not a part of the project?

A. I answered the question in the only manner in which I can answer it.

Q. You refuse to answer the question "yes" or "no", then?

A. I answered the question.

Mr. Grambling:

Your Honor, we don't believe the witness has given a fair answer to that question or an intelligent answer. They plead the affirmative of that question and we think this witness should be required to give an answer to it.

The Court:

Well, the inquiry is somewhat of a technical nature and I think his answer is intelligible. I believe I understand what his theory is about it.

Mr. Brockmoller:

All right.

Q. Mr. Resch, is it the position of the Bureau of Reclamation that no one may use the Rio Grande River between Caballo Dam and the American Dam excepting with the permission of the Bureau?

A. That is correct.

Q. And it is then the position of the Bureau of Reclamation that the City of El Paso, or any other person, must secure your permission to use the Rio Grande River from Caballo to the American Dam for transporting water, or for any other purpose?

A. In answering that question I am not positive in my mind that no one but the Bureau of Reclamation

can use the Rio Grande River between Caballo Dam and El Paso. I think that as the project has used the river for a period of nearly 40 years and has operated the river and the greatest portion of the waters in that river are project waters, that any organization that desires to use the Rio Grande for conveyance of water should work out an agreement as to how those waters would be co-mingled and conveyed with the project waters.

Q. Mr. Resch, has the United States or the Bureau of Reclamation title to the river between Caballo Dam and the American Dam?

A. I think I heard that discussed this morning by Mr. Friedkin of the Boundary Commission.

Q. I am asking you, sir.

A. The Bureau of Reclamation has no title to the bed of the river.

Q. And has it condemned any beds of the Rio Grande or not?

A. Not between Caballo Dam and El Paso.

Q. Now, Mr. Resch, to confine the last questions to the Rio Grande above the American Dam, now, is it the position of the Bureau that the Rio Grande River from the American Dam to the point just below the Riverside heading below El Paso is a part of the project works?

A. For the purpose of conveying water to the canals of the district, yes.

Q. Now, is it the position of the Bureau of Reclamation that the City, or anyone else, must secure permission from the Bureau of Reclamation to use the river from the American Dam to a point just below the Riverside heading for the transportation of waters in the river?

A. If it includes co-mingling of their waters with the project waters, I would say yes.

Q. Now, Mr. Resch, you are aware of the fact that for a space of approximately, I believe Mr. Friedkin said, half a mile, the Rio Grande River is wholly within the Republic of Mexico, is that correct?

A. I don't know what that distance is across the neck of Cordova Island. I assume that that is the location that he had in mind.

Q. Now, do you have any contracts, or anything of that nature, with those people who have the three hundred acres on Cordova Island?

A. I think I stated this morning that there is an illegal diversion there and, again, in Article 4 of the Treaty with Mexico of 1906, they disclaimed the use of the river for taking the water between El Paso and Fort Quitman.

Q. Did you make any complaint about it to the International Bounday Commission?

A. Yes, we complained about it.

Q. They didn't do anything about it?

A. Well, international problems always usually move slowly, you know.

Q. And nothing has been done about it?

A. Well, I don't know that. It is on a much higher level than we are here.

Q. Now, Mr. Resch, you said that it was the position of the Buréau that anyone who wished to use the Rio Grande River between those points should secure your permission where waters may be co-mingled, is that right?

A. I think that that would be the only practical way to handle such a problem.

Q. Now, that is the position of the Bureau in this lawsuit, is it not?

A. I don't recall the article in the petition with respect to that.

Q. Now, you do not, then, claim the right, the absolute right, to the use of the Rio Grande River then, Mr. Resch?

A. We have shared the river with the City of El Paso for the past two or three years.

Q. Under some so-called contracts?

A. No, sir.

Q. You say you shared the use not under the contracts?

A. That is true.

Q. In what respect?

A. The City of El Paso for several years has been discharging water from its wells into Canutillo fields into the Rio Grande and co-mingling those well waters with project waters and conveying them down the Rio Grande to the City of El Paso water treatment plant.

Q. And the complaint was made that we were doing so without your permission, wasn't that correct?

A. I don't think that was the exact wording of the complaint. It wasn't on that basis.

Q. Without the proper licensing agreement?

A. That was the use of the project facilities within the well site at Canutillo.

Q. Who else did you share the river with?

A. For the purpose of conveying water?

Q. For any purpose.

A. The Boundary Commission has bridges across the river, the railroads have bridges across the river, the County has bridges—

Q. That is across the river itself. Now, forgetting about the bridges and getting back to the river, and the water in it, Mr. Resch.

A. The water in it?
Q. Yes?
A. Why, we share it with Mexico.
Q. Sir?
A. We share it with Mexico.
Q. With Mexico under a Treaty?
A. Yes, sir.
Q. That is the only other one that you know of?
A. That is the only one I can recall at this instant.
Q. You share it with the Electric Company and the cement plant, don't you?
A. Under contract.
Q. With the cement plant?
A. Not under contract with the cement plant.
Q. Nor with the smelter.
A. No, nor with the smelter, but for the record the question of those pumps has been discussed.
Q. That has been discussed?
A. Yes, sir.
Q. Now, Mr. Resch, the records of your office reflect that the United States, or the Bureau of Reclamation, filed a suit against the American Smelting and Refining Company over the use of those waters in the Rio Grande, isn't that true?
A. Against the American Smelting and Refining Company?
Q. Yes, to enjoin them from using the waters of the Rio Grande in this very Court here in El Paso?
A. Frankly, I am not conversant with that.
Q. You are not conversant with that or with the result that they dismissed the suit?
A. No.
Q. You don't know anything about that?
A. No, I would like to have a reference to that because frankly, that is new to me.

Q. I refer you to your attorneys, Mr. Resch. Is it the position of the Bureau of Reclamation that the waters of the Rio Grande in Texas are not subject to the laws of the State of Texas?

A. The waters that are stored in Elephant Butte and Caballo Reservoirs as listed in the filings of 1906 and 1908 with the Territorial Engineer of New Mexico are project waters.

Q. Now, that is what this lawsuit is about, isn't it, Mr. Resch?

A. In part.

Q. Now, the question was whether or not it was the position of the Bureau of Reclamation that the waters of the Rio Grande in Texas are not subject o the laws of the State of Texas?

A. Well, if you will permit me to conclude my answer I will go ahead.

Q. But let us confine your answers to the questions asked.

A. Well, that was what I was attempting to do.

Mr. Edwards:

I think you can go ahead, Mr. Resch.

A. The filings of 1906 and 1908 as made with the Territorial Engineer in the Territory of New Mexico provide for all of the unappropriated waters of the Rio Grande and its tributaries for storage and diversion.

Q. In the State of New Mexico?

A. In the Rincon, Mesilla, and the El Paso Valleys, and that waters stored in those reservoirs is project water and it is conveyance from New Mexico to the Texas portion of the project.

Mr. Brockmoller:

May it please the Court, may I have the Court instruct the witness to answer the questions briefly. I believe it is answerable whether or not it is the position of the Bureau of Reclamation whether or not they recognize the laws of the State of Texas insofar as the waters in the Rio Grande in Texas are concerned.

The Court:

While the nature of the inquiry is such that I think it is more or less inevitable to have answers of this kind, don't you remember in the Mayor's deposition he persisted in saying the contracts were illegal, and so forth? I think the answer is pertinent. In other words, I think some explanation is more or less inescapable in getting at this inquiry that is under way.

Mr. Brockmoller:

All right.

Q. Now, Mr. Resch, you have gone into the 1906 and 1908 filings in New Mexico under the territorial laws of New Mexico. Now what filings, if any, has the Bureau of Reclamation made in Texas for the so-called Rio Grande Project?

A. One made by L. M. Lawson in 1914.

Q. Is that the only one?

A. That is the only one that I have knowledge of.

Q. As a matter of fact, Mr. Resch, you know that that is the only one. You have discussed it with the attorneys and that is the only one that there is, isn't it?

A. No. As far as the United States is concerned, yes. There are other filings in El Paso County by other farmers.

Q. Yes. I an talking about those filed by the Bureau?

A. Yes, sir.

Q. Is it the position of the Bureau of Reclamation that the American Dam was built to divert the waters for the irrigation of district lands in El Paso County?

A. Why, I thought, according to the explanation of Mr. Friedkin this morning the primary purpose of the construction of the American Dam was to permit the orderly delivery of the Mexican Treaty water of 1906.

Q. And you stand by that?

A. Yes.

Q. Is it the position of the Bureau of Reclamation that they may charge the City of El Paso, or anyone else; for the use of the facilities of the American Dam and the American Canal, and the river rectification project of the State Department?

A. The Bureau of Reclamation makes no effort whatsoever to charge anyone for the use of the American Dam, or the American Canal, or the rectification works.

Q. Is it the position of the Bureau of Reclamation that all the waters entering the Rio Grande, regardless of source, between Elephant Butte Dam and the boundary of El Paso County, Texas, are project waters?

A. Which boundary?

Q. El Paso County boundary?

A. North or South?

Q. The North boundary?

A. Yes.

Q. And is it the position of the Bureau of Reclamation that any water which the City may put into the river within the boundary limits of the City of El Paso is project water?

A. Now, in the past, or in the future?

Q. Past and future. Is that your position now or at that time; or now, if you wish?

A. Any water that is put into the river in the future there should be agreement as to how it is to be transported and conveyed. As far as sewage effluent is concerned, the contract that is in dispute before the Court spells out the manner in which that is to be considered.

Q. The question, Mr. Resch, is whether or not it is the position of the Bureau of Reclamation that any water, whether it be sewage effluent or well water, or from whatever source, that enters the river within the City limits of the City of El Paso is project water, or is that not the position of the Bureau of Reclamation?

A. Well, I am hesitant there to answer that on the basis of any water, for the reason that during local rain storms there is water that flows off of the streets of El Paso into the river and I am not certain that anyone would regard that as water that should be contracted for or agreed to because that is something over which no one actually has any control.

Q. Well, that is true of all flood and storm waters that flow in the river below Caballo Dam, isn't it?

A. No, sir.

Q. It isn't?

A. No, sir.

Q. Then your position is somewhat different as you leave the City of El Paso?

A. Not until after you pass the Riverside heading.

Q. Not until after you pass the Riverside heading?

A. No, sir.

Q. Below the Riverside heading you don't claim it?

A. We don't claim anything we don't use, but until water reaches that point we don't know what it is.

Q. In other words, you are claiming the waters and the use of them?

A. If it is project water.

Q. Well, it becomes project water when you use it?

A. As long as it is in the control of the project it is project water.

Q. Now, the question I asked you was whether or not you considered floor and storm waters falling below Caballo Dam and getting into the river as project water and you answered "yes".

A. Storm waters in excess, or flood waters in excess of what we can use on the project are waters that we can't use, of course.

Q. In other words, all storm and flood waters that go into the Rio Grande and which you can use and do use you claim are project waters?

A. We claim we have a right to those waters under the filings of 1906 and 1908.

Q. Even below Caballo Dam?

A. Yes, sir.

Q. And which is not stored in Caballo or Elephant Butte?

A. The notice of intent to appropriate says for storage or diversion in the Rincon, Mesilla, and El Paso Valleys.

Q. Now, any waters that get into the river in El Paso County by means of storm or flood waters above the pass here, we'll say above the American Dam, are they claimed by the Bureau as project waters?

A. We feel that they are covered by the 1889 and 1914 filings.

Q. Are you referring to Exhibit Number 4, the certified filings, is that correct?

A. Well, I don't recognize the number.

Q. Then it is your position that you do recognize the state law insofar as that filing is concerned, isn't that true, Mr. Resch?

A. Well, I think that is evident in that L. M. Lawson made such a filing.

Q. So you could have answered the question a while ago that I asked you about whether or not you recognized the laws of the State of Texas insofar as water was concerned then?

A. Insofar as waters originating in Texas.

Q. Oh, you wanted it to be originating in Texas?

A. Yes, sir.

Q. Now, isn't it a fact that the Bureau of Reclamation in this case here seeks an injunction to forever prevent the City from taking any water, no matter what source it has originated from, from the Rio Grande River without the permission of the Bureau of Reclamation?

A. I think that is in the contracts that are in dispute.

Q. Then that is a fact?

A. Yes.

Q. And the Bureau is seeking to have the City of El Paso enjoined from taking water from the Rio Grande?

Mr. Edwards:

If the Court please, I hate to interrupt, but the pleadings speak for themselves, the prayers contained in the complaint, and, certainly this witness had nothing to do with what the United States, as a party plaintiff, considered a proper prayer and it is not within his jurisdiction.

Mr. Brockmoller:

May it please the Court, this is cross-examination and Mr. Edwards went into quite some length about the contracts and rights, and so forth, under the contract, and I would like to show what the attitude of the Bureau is.

Mr. Edwards:

We have no objection to his question about the contracts, but when it comes to questions like: "Didn't the United States ask for an injunction in the complaint?" We think the complaint speaks for itself.

The Court:

Well, I will overrule the objection so far as the question may be introductory to asking the witness something about the policy or position of the Bureau.

Mr. Brockmoller:

(To the Reporter) Would you read the question?

Whereupon the Reporter read as follows:

"Q. And the Bureau is seeking to have the City of El Paso enjoined from taking water from the Rio Grande?"

A. Well—

Q. Enjoined from taking from the river an amount of water equivalent to that placed in the Rio Grande by sewage effluent?

A. Well, again, Mr. Brockmoller, I think that is one of the points in dispute. In the contract it says that, when sewage effluent reaches the river it is project water.

Q. Now, Mr. Resch, between the American Dam and the City's primary sewage plant, where effluent

is dumped into the river, there are no diversions for farming purposes, are there, on the river, other than the one you say is an illegal Mexican diversion?

A. Cordova Island.

Q. Cordova Island?

A. That is correct, yes.

Q. There could be no injury resulting to any farmer within the El Paso District from the fact that the City might remove at its water treatment plant for drinking purposes an amount of water equal to that which is placed in the river at its sewage treatment plant?

A. Actually such a policy could result in an increase release of water from storage.

Q. In that connection, Mr. Resch, your testimony is then, is it not, that the Bureau takes into consideraion, with reference to the amount of water that it is going to release from storage, the sewage effluent that is placed in the river?

A. Always back through the years for the last thirty years that I know of.

Q. You take credit for that effluent against the demand that you have for water, in other words?

A. Yes.

Q. And have done so long before any of these contracts were signed?

A. Yes.

Q. Now, Mr. Resch, if you had to release that amount of water from storage there would be quite a considerable carriage loss by evaporation or transpiration, and so forth, wouldn't there?

A. That is always present.

Q. And, as a matter of fact, you are saving that carriage loss even from the distance between the water treatment plant and the sewage treatment

plant, at the present time, if the City were to take an amount equivalent from that placed in the river below—

A. It would reduce the flow at El Paso and that would have to be replaced in storage.

Q. The question I am getting at is this: There would not be any carriage loss for that distance there, would there, if the City took out an amount and put back in an exact amount lower down the river?

A. No.

Q. There wouldn't be any carriage loss?

A. No. That is not the answer to your question. The answer to your question still is that under that condition we would have to increase the release from storage.

Q. In other words, you would have to release additional water at Elephant Butte Dam, is that right?

A. Yes, sir.

Q. Under your answers here this afternoon, do you know whether or not there are any storm or flood waters entering the Rio Grande in El Paso County, above the City of El Paso—or above the American Dam—let's put it that way.

A. They occur infrequently and in comparatively small volumes in comparison with the flood waters that enter the river below Caballo Dam in New Mexico.

Q. You don't have any idea of how much water that is?

A. I would give you a rough estimate that, oh, once every ten or perhaps fifteen years, in the neighborhood of 3,000 acre feet scattered over perhaps five, six, or as many as ten different periods, lasting from half an hour to two or three hours, some of them perhaps six hours

Q. The question was how much water, in acre feet, per year over an average, if you know?

A. I can't answer the question in any other manner than I did.

Q. The date of the first diversion by the Bureau in El Paso was in 1913; that is right, isn't it, Mr. Resch?

The Court:

1913?

Mr. Brockmoller:

1913. I believe that is what he stated this morning.

A. After the purchase of the Franklin Canal, you mean?

Q. No, no; by the Bureau?

A. I would say yes. The Franklin Canal was the first canal that we operated in the El Paso Valley.

Q. I thought that is what you said this morning. I was trying to get that date clear in my mind.

A. Yes.

Q. Mr. Resch, do you recall the occasion when the City of El Paso was seeking from the State Board of Water Engineers a permit for some 27,000 acre feet? Were you present at that hearing?

A. Yes, sir.

Q. You were?

A. Yes, in Austin.

Q. You were present there representing the Bureau of Reclamation?

A. No, I was not representing the Bureau of Reclamation at that hearing. I was there as an observer. I think we had a legal representative present at that time.

Q. Mr. Baird was there as a representative?

A. Yes, sir.

Q. And the United States filed a protest by Mr. Baird at that proceeding?

A. Yes, sir.

Q. Oh, yes, one brief question about the bridges across the Franklin Canal within the city limits of the City of El Paso. Have any of them been reconstructed by the Bureau of Reclamation?

A. Yes, I think we reconstructed one several years ago.

Q. And how many are there across the Franklin Canal within the City, do you have any idea?

A. Well, let's limit that to Concepcion Avenue.

Q. All right. We will start at Concepcion Avenue coming up to the American Dam.

A. I think at the present time the total number of bridges is about thirty-five.

Q. About thirty-five?

A. Yes, sir.

Q. And most of those bridges were built around 1914 and 1915, were they not?

A. Yes, that's true.

Q. Under the franchise which you earlier saw and read?

A. I think those bridges were constructed according to the franchise.

Q. According to that franchise?

A. Yes, sir.

Q. And you have only replaced one of them?

A. That is correct.

Q. And you maintain the others, is that correct?

A. Yes.

Q. In the same condition, same width, and the same character of work as they were originally constructed back in 1914 and 1915?

A. Yes, sir.

Q. Most of them, outside of about four, are wood structures, are they not?

A. No, they are a combination of concrete, steel, and wood. Nine of them are all concrete reinforced steel, box-type culverts across the main streets of El Paso.

Q. Those four now—

A. Nine.

Q. That is in the downtown area?

A. Yes.

Q. And that is under the franchise of 1913?

A. Yes, sir.

Q. Now, the others were built in accordance also with this franchise at that time?

A. Yes, sir. And the majority of those consist of either steel I-beams and asphalt topping and concrete abutments, or concrete abutments and asphalt flooring.

Q. Now, forgetting the nine bridges in the downtown El Paso area, what are the widths of the other bridges in comparison to the present street width across or that crosses the canal?

A. I think they range in width from 70 to 20. I am not certain about the 70, but the main streets in the city proper—

Q. Forgetting those nine.

A. They are one full street width. Now, in the eastern limits of the City they average about 20 feet in width.

Q. How about the one on Oregon Street?

A. Oregon? I am not certain about Oregon

Q. El Paso Street?

A. I wouldn't like to state for any individual street.

Q. You don't know, but El Paso and Oregon are two of the main downtown streets which you included in the nine, isn't that correct?

A. No. Oregon was not included in the nine all-concrete and steel culverts.

Q. Was El Paso?

A. Yes, I think it is.

Q. Now, over—Rather at the bridges, other than the nine that you are speaking of, there are signs indicating load limits, safe load limits to go across the bridge?

A. Yes, sir.

Q. Those were erected by the Bureau of Reclamation?

A. Yes, sir.

Q. After studies made by them as to the safety of the bridges, is that right?

A. Yes, sir.

Q. And those limits exist there today?

A. Yes. I hope they do.

Q. Do you know whether or not those limits are within the limits for ordinary bus transportation?

A. I would not recommend that a heavily loaded bus attempt to use those bridges regularly.

Q. You would not recommend it?

A. No, sir.

Q. It would be a very definite safety hazard to the occupants of the bus?

A. I would say yes.

Mr. Brockmoller:

That is all.

On Re-Direct Examination.

Questions by Mr. Edwards:

Q. Mr. Resch, the term "diversion", as applied to waters, has been used rather extensively this afternoon, and I am inclined to think possibly that it has been used by Mr. Brockmoller in one sense and your answering in another sense possibly. He was asking you something about diversion of water from the Rio Grande at the Riverside heading. Now, did you mean when you answered him to use that term in the sense that there was a physical change in the course of water, or did you mean it in the sense as applied to irrigation as understood by irrigation engineers to be a diversion?

A. Well, speaking of diversion, what I was using in my thinking, was the technical engineering meaning of diversion, which means transfer from one point to another.

Q. Yes. Now, as used in irrigation parlance, where would you say that the diversion first took place for the waters of the Rio Grande by the United States?

A. Well, initially that would be the release from the storage dams.

Q. Up in Caballo? The release from Caballo Reservoir?

A. Yes, sir.

Q. And how does that water utlimately get into the Riverside heading?

A. Well, it is conveyed down to the various points of takeout from the river and returned through wasteways and through drainage systems back to the channel of the river where it is conveyed to another takeout point, and reconveyed to the canals and laterals, a portion of it returned in the form of waste and an-

other portion in the form of return-flow, then conveyed further down, and then again taken out down at a lower point.

Q. In other words, it has a control point all the way through from the Caballo Reservoir all the way down to the Riverside heading?

A. That is correct.

Q. When the water is physically turned from the river channel in the Riverside heading you are not speaking of that as a diversion of water in irrigation parlance?

A. No, that is water that is in conveyance, just being taken out to the land.

Q. Now, Mr. Brockmoller asked you something about your knowledge of a list attached to certified copies of filing 123, which was offered in evidence yesterday, but that was not offered in evidence while you were on the stand, was it, Mr. Resch?

A. I certainly do not recall being asked to identify that exhibit.

Q. As far as that copy was concerned that didn't come from your office, did it?

A. No, sir.

Q. You know where I got that from?

A. I have heard you state that you obtained it from the State Board of Water Engineers.

Mr. Edwards:

(To Mr. Brockmoller): I think if you will look at that exhibit you will find it certified by the Secretary of the State Board of Water Engineers.

Q. Mr. Resch, you have stated that the Franklin Canal, as it now is called, was constructed in 1889 through the City of El Paso. Is that canal traversing

the City mainly through what is now known as the Campbell Addition to the City of El Paso?

A. Yes, sir. It goes through what is known as part of the Campbell Addition.

Q. Have you examined the deed records of El Paso County over at the El Paso County Clerk's Office to find when the map of Campbell Addition was filed for record in that office?

A. Yes, sir.

Q. When was that?

A. That map appears in back of Book One with a notation on it that it was filed for record February 21, 1896.

Q. Mr. Brockmoller was inquiring about a list that you had given him a while back of landowners who were holding lands in excess of 160 acres within the Texas Unit of the Rio Grande Project, and you had stated to him during the course of your testimony that as of now all but three had been brought into compliance. What did you mean by that, Mr. Resch?

A. I mean the compliance program that was set up by the Secretary of the Interior for the Rio Grande Project about 1950.

Q. And what was that, and what is it?

A. Those water users of the project who own in excess of 160 acres and their marital status is single, are permitted to enter into what is commonly referred to as a recordable contract, or, in other words, an agreement for the disposition of the lands in excess of 160 acres. In the case of a man and wife the Secretary of the Interior has ruled that a man and wife each may claim 160 acres. Thus, under that condition the excess, insofar as man and wife are concerned, would not begin until the ownership exceeded 320 acres. And married people have the same privi-

lege for their excess lands of entering into these contracts wherein they are permitted a period to either pay off the outstanding construction charges against the lands in excess or by disposing of those lands to an eligible owner.

Q. Within what length of time?

A. The contract gives them until January 1, 1962 to bring their lands into compliance.

Q. Now, Mr. Brockmoller also asked you that if it wasn't a fact that now there were some pieces of land within the city limits that were being served by the project, and I understood you to say that there were. The City of El Paso as a municipality is not paying those charges, is it?

A. No, sir.

Q. The private landowners are paying them just as if they were down the valley or anywhere, is that correct?

A. That is correct.

Q. Now, Mr. Brockmoller was asked you, about storm or flood waters falling in El Paso County below the Texas-New Mexico state line, and you stated that that did occur at some time. I will ask you whether or not those are flood or excess waters that rapidly passes on down the river within what length of time ordinarily?

A. They most assuredly do in a matter of a very few hours.

Q. Are they such as to give water users any appreciable advance notice that there will be any firm supply of water that they can take after a certain time, or for a certain time, or just catch them as they go by, if they can?

A. That is the way we operate with them. We catch them as they go by.

Mr. Gray:

If the Court please, in connection with the testimony which has been offered with reference to excess land limitations it would be appreciated if you would give judicial recognition to Section 46 of the Act of May 25, 1926, which is the authority for the Secretary of the Interior to establish recordable contracts providing the consideration under which lands may receive water when the ownership is in excess of 160 acres of irrigable land in single ownership.

The Court:

What year?

Mr. Gray:

That was the Act of May 25, 1926.

The Court:

What section?

Mr. Gray:

Section 46. It appears, Your Honor, at Page 318 of the "Reclamation Laws Annotated".

The Court:

All right.

Mr. Gray:

If the Court wishes I would be glad to read that into the record.

The Court:

All right.

Mr. Gray:

(Reading) "No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years, from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a Court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division

if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: Provided further. That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the year after such public notice shall be transferred to and paid as a part of the construction payment."

Questions by Mr. Edwards (continued):

Q Mr. Resch, the question of the use of water by the El Paso Electric Company Plant up above El Paso was inquired into by Mr. Brockmoller, and I am not sure that you made yourself entirely clear as to what you meant when you answered him. What is the arrangement up there by the Electric Company for the use of water and what is their consumptive use?

A Under the contract provisions the El Paso Electric Company has the privilege of using the waters of the Montoya Drain for cooling and condensing pur-

poses. In addition, the contract also says that they may have the use of the waters of the Rio Grande for the same purposes. The flow of the Montoya Drain, in normal years, is perhaps in the neighborhood of 70,000 to 75,000 acre feet. The answer that I gave to Mr. Brockmoller was that it would be impossible for them to dissipate 50,000 acre feet a year. I think that Mr. Brockmoller would rather have the answer that they have the right to use the waters of the Montoya Drain, which does flow in normal years 70,000 to 75,000 acre feet a year, but from the standpoint of consumptive use or the actual dissipation of the water it is physically impossible for the El Paso Electric Company to do away with 50,000 acre feet of water a year.

Mr. Grambling:
I would like for him to explain. He has been using the term "dissipate" there.

The Witness:
Consumptive use is a use similar to farm use.

Mr. Edwards:
That is all I have.

On Re-Cross Examination.

Questions by Mr. Brockmoller:
Q. Mr. Resch, Mr. Edwards asked you if you had gone to the County Clerk's Office and checked to see the date of the filing of the Campbell Addition map. I believe you said you did and found it back of Book One and was filed in 1896?
A. Yes.
Q. Now, who sent you over there to check that record?

A Well, as a matter of fact, I have a copy of the map of Campbell Addition in my office that I have had for some time, and we were always rather curious down there that there was no indication of a dedication on that map, so Mr. Lawrence Stevens some several months ago advised me that there might be a question as to dedication of that sub-division and it was at that point that I began to look into the matter and, as a matter of fact, I accompanied Attorney Edwards to the Record Room in the basement of the County Courthouse and, in his presence, examined that map.

Q Now, Mr. Resch, did you find that the map was the first map of the Campbell Addition, the second map of the Campbell Addition, or did it indicate on the map?

A I don't think that it indicated. The only thing that I noticed was that this was a map of Campbell's Addition and the notation of filing was February 24, 1896.

Q Now, Mr. Resch, did you by any chance further examine the records of El Paso County to see whether or not any real estate had been sold in the so-called Campbell Addition prior to 1889 from a map designated as the Campbell Addition map of the City of El Paso?

A I didn't see any records other than this Book One that I examined.

Q That was the only one you did examine?

A Yes, sir.

Q Did you find tracts of land sold, according to that map, back as far as 1884?

A I only examined the map that I refer to.

Q You just examined the map?

A Yes, sir.

Q You did not examine any of the other records?

A. No, sir.

Q. Now, did you notice on the Campbell Addition map whether it was signed by anyone?

A. It bore the signature of, I think it was, the County Clerk, but I don't remember the name.

Q. Now, did it have any statement on there that it was filed by the addition owners, that they were the owners of the addition, and they were dedicating the streets and public places there to the public?

A. To the best of my recollection there was something to this effect: "Filed for record on this date, at such and such a time."

Q. And "County Clerk"?

A. And signed by the County Clerk.

Q. But it was not signed by the map owner himself?

A. I don't recall such a signature.

Q. You don't know then that Campbell Addition map was never filed by the owners of the addition, but was just filed by someone else?

A. No, I don't know anything about it.

Q. And you don't know that, as a matter of fact, that many pieces of property were sold in the Campbell Addition long before 1889?

A. Oh, I would assume such to be the case.

Q. Now, Mr. Resch, you sated that all but three of the individuals named on this list, which I asked you about earlier, were in compliance with the Secretary's directive and instructions to you?

A. Yes, sir.

Q. Which three were those?

A. C. C. Bills, J. H. Banes, Jr., and Mrs. Maggie Worshal.

Q. Now, has the Texas and Pacific Railroad Company sold its lands? Was any provision made by the Secretary for a corporation to dispose of its holdings?

A. The Texas and Pacific?

Q. Yes. The Texas and New Orleans. Excuse me

A. The Texas and New Orleans has already paid off their construction charges on their excess land, but I understand that at this time there is a new transaction going through in which the railroad company may be acquiring more property. If such be the case they will most assuredly be contacted.

Q. How about the Mortgage Investment Company? That is a corporation, isn't it?

A. I think they have a recordable contract

Q. They have a recordable contract. You didn't mention what type of contract the corporation would have to make. You mentioned that of a single person or a married person. What type of contract would a corporation make?

A. Subject to correction by legal counsel I should think that the same privilege is extended to a corporation up to 160 acres.

Q. I asked you about what your instructions were. You mentioned the instructions that you had received from the Secretary.

A. That is correct, and I am always writing in for clarification and discussing them with counsel

Q. You are doing that now?

A. Yes, sir.

Q. Ralph Farms, Incorporated, had some 160 acres?

A. Ralph Farms has a recordable contract and at the same time they have been paying the outstanding construction charges on other land that they have acquired

Q. Now, when will this project be paid up Mr Resch?

A. September the 1st, 1968

Q. In other words, six years after the date set by the Secretary for compliance?

A. Yes, sir.

Q. And if they pay up before then they are relieved of the obligation of complying?

A. Yes, sir.

Q. Now, Mr. Resch, concerning this Electric Company matter, you say that they can't dissipate 50,000 acre feet of water. They use it for cooling purposes, and there is a very extensive or excessive use of water as it is sprayed up into the air, is there not, for cooling purposes, for condensing purposes, and so it dissipates quite rapidly?

A. That all depends on the area.

Q. Now, they have a spray pond, don't they?

A. They use a spray pond, as I understand it, for cooling purposes.

Q. Under the contract,—you have seen the contract—they take a maximum of 500 second feet.

A. That is because they have a re-circulating system and they can build it up by pumpage.

Q. And they take it out in excess of 50,000 acre feet a year?

A. That is run through the system, the circulating system. That is not a dissipation or consumptive use of water.

Q. It is taken up by them?

A. It is returned immediately back to the river or to the drain.

Q. It is somewhat similar to the fact that the City takes out, we'll say, 10,000 gallons at the water treatment plant and then puts in 10,000 at the sewage treatment plant?

A. I don't think it is similar at all.

Q. You don't think it is similar at all?

A. No, sir.

Q. In what way does it differ?

A. Because it is exactly the same water that is returned to virtually the same point that it is taken out of.

Q. Well, isn't it a fact that you get additional water that you didn't have before when the city puts it in?

A. There is one other thing that I would like to point out, too, and that is that that is done under contract.

Q. But it is an amount of water in excess of what is taken from the river, isn't it?

A. No. I will not say that for this reason—

Q. You deny that?

A. I do not deny it nor do I affirm it, because I don't know.

Q. Now, Mr. Resch, how much money, if you know, does the El Paso Electric Company pay to the El Paso District for repayment to the Bureau?

A. I can't answer that off-hand. I will have to consult the record.

Q. Is it a flat sum?

A. I don't know.

Q. Did the United States of America, through the Secretary of the Interior and the Bureau of Reclamation, approve the contract?

A. Yes, sir.

Q. Do they pay direct to the Bureau or do they pay to the Water Improvement District?

A. No, sir, they pay to the irrigation district.

Q. And do you keep any record of the amount of water delivered to the Electric Company?

A. We know how much water flows down that drain, yes.

Q. And you assume that they take it all, is that right, sir?

A. I do not assume that they take it all or half of it, or part of it. I assume that they use it under that contract.

Q. They use it under the contract. And do they—you don't know how they pay for it, whether it is a flat sum, or per acre feet, or any other manner?

A. That is all included in the contract which I shall be very happy to produce for you.

Q. Thank you. I would be happy to have you produce it. Do you know how much of the water is used by them?

A. I think I answered that a moment ago that I consider that it is comparatively a very small amount of water. I think I used the adjective "infinitesimal". I don't know what it uses.

Q. You don't have any idea in gallons per day, or anything of that nature, as to how much?

A. I think that I said that I do not know.

Q. Does the Bureau keep any records of it?

A. We don't consider that a record is necessary.

Q. No records are kept?

A. No, sir.

Q. Now, Mr. Resch, you have been questioned about this compliance program read into the record, the Law of 1926. Has the Bureau here locally, to your knowledge, been trying to get these people into compliance since 1926?

A. Absolutely, yes. I have acquired quite a few gray hairs over that program.

Q. But, Mr. Resch, have you ever at any time refused to deliver any of them any water?

A. No, sir. During the period that we are going into and getting them in compliance I have received instructions to continue normal operations.

Q. You have been negotiating with them off and on since 1926?

A. No, sir, I have not.

Q. Well, you have not, but the Bureau has—let's put it that way—and at no time since that time has the Bureau ever refused to furnish them any water?

A. That is correct.

Mr. Brockmoller:

That is all.

Mr. Edwards:

That is all.

Questions by the Court:

Q. Just a minute. How far is it from this River side gate down to the point where this sewage discharge comes into the river bed?

A. I estimate it is approximately ten miles.

Q. Well, how near does that take you to the nearest boundary of El Paso County?

A. That is probably between thirty and forty miles by river down to the El Paso-Hudspeth County line.

Mr. Brockmoller:

From the Riverside heading?

The Witness:

No. From the point of the sewage outlet.

By the Court:

Q. Under the operations as conducted in this Rio Grande Project is there ever any final residue water?

A. You mean return water at the lower end of the project?

Q. Yes.

A. Yes, sir. And that is the waters that we deliver to the Hudspeth County Conservation and Reclamation District under a Warren Act contract dated December, 1924, and amended and supplemented in 1951, and in addition there are infrequent periods in which floods pass down the river and pass on out from El Paso County.

Q. I don't know whether I have gotten the information yet or not, and so I will ask you whether the Bureau of Reclamation has any continued interest in the supervision of the water that is received by the Hudspeth District?

A. Yes, sir, under the type of waters that are delivered to the Hudspeth District in normal years, not in this drought period, because there is very little water around here at the present time, but those waters are constituted of return flow waters from the project, waste waters that may develop on the irrigation systems as a result of rains or cold nights, and those classifications of water we pass through our distribution system to facilities of the Hudspeth District and they pay for those at the rate of $1.25 an acre for each acre that they irrigate in that district.

Q. All right. After the Hudspeth District has had its contact with the water is there some residue water left?

A. At times there is some flood waters that pass down the river. Unfortunately, the magnitude of those flood waters has to be determined from this standpoint. To get to the lowest diversion point for the Hudspeth District they have to traverse approximately 40 to 45 miles of river and the floods around here are of such short duration that as that flood progresses down the river it loses itself rapidly, so it is

difficult to say that for any flood passing the Riverside heading how much of that is going to remain in the river at the Hudspeth County Conservation and Reclamation District some 40 or 45 miles below the Riverside heading.

Q. Well, taking water that has once been impounded by the Elephant Butte Dam or by the Caballo Dam, and that is released there to come down this way, is there any of that water that is ever free water again, outside of any further claim of the Reclamation Bureau in the river bed?

A. There are at times in normal years waters of that nature that accumulate at the end of the project due to rains on the valley land or severe temperature drops at night, yes.

Q. Where does this sewage waste that you have spoken of enter into use again?

A. It is available for conveyance into the Riverside Canal and can be used again for approximately 28.000 or 29.000 acres of land that irrigate from the Riverside Canal.

Q. Does the Franklin Canal throughout its length, or most of its length, occupy street space?

A. It runs along 8th Street for approximately a mile and a half right down through the center of 8th Street, then it turns and goes Northeast to what we know as the Cotton Addition and, of course, crosses several streets, that is, not in a street, then it turns easterly to San Antonio Street and then turns again and runs down an alley, and then makes another turn and runs parallel but not through the middle of Boone Street, and then makes another turn easterly and runs parallel to what is known locally as Paisano Drive, which is a new highway through the southeastern and easterly sections of El Paso, and after

reaching what was the city limits of El Paso up until two or three years ago it makes another turn towards the northeast and gets away then from the street system for a short distance until it hits what was originally the old highway coming into El Paso, which now, I think, is referred to as the North Loop Road, or some such designation, and it runs down one side of that road for perhaps a mile, and then leaves continuously any streets and goes down through the valley.

Q. In that part of it lying within the city limits of El Paso is it of approximately street width?

A. Yes, sir, it is down this 8th Street. It is a concrete-lined section now. If I recall correctly, it is 26 or 27 feet across the top and after it passes out of the concrete-lined section then it broadens out a little bit and occupies a width of between 40 and 50 feet, and then for the remainder of its distance through the City and through the valley.

Q. At that width it would practically monopolize some streets.

A. If it was running down the center of the street in that width of 40 or 50 feet it would, yes, but where that is happening it is usually out on the side.

Q. You mean on a purchased right-of-way?

A. Yes, sir, purchased in part. Part of the original franchise, I believe, did cover right-of-way through an eastern part of the section in the vicinity of San Antonio Street.

Q. Now, one other thing, I want to refer back to Plaintiffs' Exhibit 36 and make certain of your meaning. I am looking at this graph that constitutes the last sheet of the exhibit and I think that is what you had before you at the time of your testimony in connection with this exhibit. The thing I want to know is

whether or not that part of one of those columns which is marked to represent "no flow years" or period of years, is accumulated, then in the figure given for "flow not exceeding 100 cubic feet per second"—for example, I will ask you to look at the year 1903 and interpret that again.

A. In 1903, this portion of the graph that is double-hatched—

Q. I understand that.

A. —represents that there were a total of twenty days in which there was no flow, zero flow, then from that portion out to the end of the graph represents that there were a total of 180 days in which the flow did not exceed a hundred cubic feet per second, or making it cumulative, adding the two together, would mean that the days of zero flow and the days when it did not exceed 100 cubic feet per second totaled 200. It is cumulative.

Q. Well, it is not cumulative in the sense I was talking about. I thought that maybe having said how many days there were with no flow and then how many days there were with flow not exceeding 100 cubic feet per second that there might be cumulated those two, and reached the 200 day figure, but you have clarified it now and I understand that it does say segregated twenty days and 180 days.

A. Yes, sir.

The Court:

That is all.

(Witness excused.)

A recess was then taken at 5:10 o'clock P.M. on November 17, 1954 and upon reconvening at 9:00

o'clock A.M. the next day, November 18, 1954, proceedings were resumed as follows:

Mr. Edwards:

Your Honor, last evening we succeeded in finding those two deeds that I was looking for, and they are the two deeds that I wish to offer as companion exhibits to Plaintiffs' Exhibit Number 108, which was the deed from Fraser and others to the City of El Paso, and the other two are from Price to the City of El Paso; and I assume the Court's ruling will be the same in each case but we want to preserve the record. No. 108 is the deed dated June 21, 1954 from George C. Fraser, George L. Burr, John K. Olyphant, Jr., to the City of El Paso, recorded in Book 1176, Page 504, Deed Records of El Paso County. And the next one, No. 108a, is the deed from Robert B. Price, Jr., joined by wife, Georgiana Price, together with Barbara Price Curlin and Husband, Jack V. Curlin, to the City of El Paso, dated September 3, 1954 and recorded in Book 1186, Page 183, Deed Records of El Paso County, Texas, and Exhibit 108b of the Plaintiffs is the deed from Price's Producers, Inc. to the City of El Paso dated the 3rd day of September, 1954, and recorded in Book 1186, Page 178 of the Deed Records of El Paso County, Texas.

N. B. PHILLIPS, a witness for the Plaintiffs, having first been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Edwards:

Q. State your name, please.

A. N. B. Phillips.

Q. Where do you live, Mr. Phillips?

A. El Paso, Texas.

Q. What is your business?

A. Manager of the El Paso County Water Improvement District No. 1.

Q. How long have you been such manager?

A. Since the 9th day of January, 1950.

Q. Is that the Texas Unit of what has been described here as the Rio Grande Project or the Rio Grande Federal Reclamation Project?

A. It is.

Q. Prior to your employment by the Texas Unit of the Project were you in any other location associated with it?

A. Yes, sir. I was connected with the Elephant Butte Irrigation District, Las Cruces, New Mexico.

Q. For how long?

A. From May 16, 1925 until December 31, 1944.

Q. In what capacity?

A. In two capacities: as Assessor-Collector-Treasurer of the District, and later Manager of the District.

Q. Mr. Phillips, you, of course, are in charge of the records of the District in your office?

A. Yes, sir.

Q. And from those records can you say whether or not the City of El Paso is now or has ever been as a municipality a part of the Texas Unit of the Rio Grande Project?

A. The records do not reflect that they are or have been.

Q. The City of El Paso as a municipality is paying no construction charges or operation and maintenance charges or anything of that sort as a municipality?

A. No, sir.

Q. While we are on the subject, Mr. Phillips, will you explain, please, the various charges that are made to property owners within the area served by the Project?

A. Under contract with the Bureau of Reclamation the El Paso County Water Improvement District Number One is obligated to repay and has been obligated to repay the construction costs of the District, that being the Texas portion of the Rio Grande Federal Reclamation Project. Those charges, of course, are known as construction repayment costs. The District, also by contract, is operated and maintained by the Bureau of Reclamation and those charges are known as maintenance and operation charges and are paid by the District to the Bureau.

Q. Now, just what do those charges cover?

A. They cover the entire cost annually of the operation and maintenance of the District.

Q. You mean the facilities for the distribution of water, is that what you mean?

A. That is the operation component of the charge. The maintenance cost is the maintenance of the facilities. In addition to those two charges, also under contract, we pay annually to the Bureau of Reclamation a Reservoir Service Charge, and that charge is based on the contractual terms whereby we pay ten cents per acre foot for all water released at Caballo Dam during the year for irrigation purposes. Of course, you understand that this charge is participated in by both the El Paso District and the Elephant Butte Irrigation District. We pay forty-three percent of the cost and the upper District pays fifty-seven percent of the cost. There is also assessed against the water users in the District a charge which is known as "excess water" charge. That charge is

represented in this fashion, that when a water user is issued a permit to use water, the permit permits him to use two feet on the basis of his assessed maintenance and operation charges. All waters that he uses in excess of two feet are charged to him on another bill known as "excess water."

Q. Mr. Phillips, you spoke of the El Paso Unit, being the El Paso County Water Improvement District Number One, paying forty-three percent and the upper unit, that is the Elephant Butte Irrigation District, paying fifty-seven percent. Are those percentages based on the acreage within the two districts?

A. Yes, sir.

Q. Now, where does the El Paso County Water Improvement District Number One get the money with which to pay these items to the Government as you have described it and how do they get it?

A. By setting up an assessment roll.

Q. Assessment against who?

A. Against each individual tract of water right lands within the District.

Q. And approximately how many accounts or owners do you have within the District to whom these separate assessments are made?

A. At the present time there's about 89[illegible] accounts on the books of the District.

Q. 8900—Mr. Phillips, before we go further, those charges that you have spoken about, for which assessments are made, are secured by liens against the lands of the individual owners?

A. Yes, sir, they are.

Q. I refer you now to the contract of February 18, 1941, between the United States and the City of El Paso and the El Paso County Water Improvement District Number One, which is Plaintiffs' Exhibit

Number 27, and refer you to Section 8 of that contract which reads: "The City shall provide, without cost to the District or the United States, in such location and in accordance with such plans and specifications and construction practices as may be approved by the Project Superintendent, suitable facilities for diversion of water from the Rio Grande to the project works, and, without cost to the District or the United States, shall maintain the same in a condition satisfactory to the Project Superintendent, throughout the time during which the City may be entitled to receive water delivery hereunder." Did the City do that?

A. The City constructed the water treatment plant adjacent to the Franklin Canal.

Q. And Section 10(a): "Before delivery of water to the City as provided in Article 9 hereof and on or before January 31, 1941, in the event the City has acquired lands prior to that date, and thereafter, as to any acquired lands subsequently acquired by the City and within ten days of such subsequent acquisition, the City's Superintendent shall deliver to the Manager:

(1) Evidence of the City's ownership of acquired lands.

(2) A power of attorney duly executed on behalf of the City, authorizing the District as attorney in fact for the City to offer for sale, and sell and convey to the highest and best bidder, who shall be a qualified landowner, for cash at public auction after notice of such sale published once a week for three consecutive weeks in a newspaper of general circulation in El Paso County, Texas, any of said lands held by

the City after the expiration of ninety days from the effective date of the termination of the City's right to receive water under the provisions of this agreement as provided for in Article 13(a) hereof." Was that complied with by the City?

A. Well, I think in the files of the District there was communications to the effect that the City had notified, a representative of the City had notified the then manager of the El Paso County Water Improvement District Number One that the City had acquired certain tracts of ground and a power of attorney was furnished with the correspondence.

Q. I will ask you to examine these papers which I hand to you and are marked "Plaintiffs' Exhibit Number 115" consecutively to "Plaintiffs' Exhibit Number 148" (Reporter marks same), and state whether or not that is correspondence of the files of the El Paso County Water Improvement District Number One?

A. Those are correspondence which have been taken from the files of the El Paso County Water Improvement District Number One.

(Exhibits "P-115" through "P-148" were then shown to opposing counsel for examination.)

Mr. Grambling:

We raise no objection to the letters which counsel has offered in evidence here, which are Exhibits 115 through 148, with the exception of Exhibit 139. Exhibit No. 139 is a resolution which concludes by saying: "Now, therefore, be it resolved by the City Council of the City of El Paso, Texas that J. E. Anderson be and he is hereby directed to execute on behalf of

the City of El Paso the attached form of power of attorney to the El Paso County Water Improvement District No. 1", and there is a power of attorney attached to this resolution. We object to Exhibit No. 139 because the City cannot delegate its duty to anyone and cannot give anyone a power of attorney to act for it, such as they attempted to do in this case. They are non-delegable duties and we object to that resolution as being improper, illegal, and not binding on anyone.

The Court:
Overruled.

Mr. Grambling:
Note our exception.

Plaintiffs' Exhibits Numbers 115 to 148, both inclusive, were thereupon received in evidence by the Court. These consist of various letters and include a resolution with power of attorney attached thereto. All of these exhibits are copied on the following pages:

"P-115".

City of El Paso, Texas

Department of Water and Sewerage

J. E. Anderson,
Mayor

Ashley G. Classen,
Supt.

July 28, 1941

Mr. Roland Harwell, Manager
El Paso County Water Improvement District No. 1
El Paso, Texas

Dear Mr. Harwell:

In accordance with the provisions of Section 10-F of a certain contract agreement by and between the United States of America, the City of El Paso, Texas and the El Paso County Improvement District No. 1 dated February 18, 1941, the City of El Paso wishes to notify your district of its intentions to purchase three (3) tracts of land located within the boundaries of the district and briefly described as follows:

1. Tract No. 2-F, Block 4, Socorro Grand consisting of 31.46 acres more or less.

2. 132.92 acres more or less out of the W. C. Stanley Survey No. 50 belonging to Mr. A. A. Bramwell.

3. 186.59 acres more or less out of the W. C. Stanley Survey No. 50, being Tract No. 2, Block 9, Lower Valley Resurvey.

We trust that the above described lands will be found by your district officers to be in locations which will not interfere with the efficient operation of the district or materially impair the economic status of any community therein.

We will greatly appreciate your kind approval of our acquisition of the above described lands and trust we may be favored with a reply at an early date. Will you also kindly send a carbon copy of your reply to Mr. Theodore Andress, City Attorney.

Thanking you for your kind consideration of our request, I am

Very truly yours,
(S.) ASHLEY G. CLASSEN,
(Ashley G. Classen),
Supt.

AGC:pg

"P-116".

August 4, 1941

Mr. Ashley G. Classen
Superintendent Department of Water and Sewerage
City of El Paso
El Paso, Texas

Dear Mr. Classen:

I am in receipt of your communication of July 28 in which you give notice of the intention of the City of El Paso to purchase lands described as Tract 2F, Block 4, Socorro Grant containing 31.46 acres; 132.92 acres out of the W. C. Stanley Survey Number 50 belonging to Mr. A. A. Bramwell; 186.59 acres out of

the W. C. Stanley Survey Number 50 being Tract 2, Block 9 Lower Valley Resurvey. These proposed purchases are to be made for the purpose of supplementing the water supply of the City of El Paso under terms of the contract dated February 18, 1941 between the United States, the City of El Paso and El Paso County Water Improvement District Number One.

Having considered the matter fully, we find that the proposed purchases will not interfere with the efficient operation of the District or materially impair the economic status of any community therein and are accordingly approved.

Very truly yours,
ROLAND HARWELL,
Manager.

cc: Theodore Andress, City Attorney
L. R. Fiock, Superintendent, Bureau of Reclamation.
RH:M

"P-117".

The City of El Paso, Texas

(Seal)

Legal Department

910 Bassett Tower
El Paso, Texas

J. E. Anderson
Mayor

Frank B. Clayton
City Attorney
Reuben F. Momsen
Thepdore Andress
Abner S. Lipscomb
Assistants

February 11, 1942

El Paso County Water Improvement District No. 1
El Paso National Bank Building
El Paso, Texas

Attention Mr. Harwell.

You will recall that some time ago I conferred with you by telephone relative to the purchase by the City of El Paso of certain lots in the Alamo Alta Townsite from W. F. Payne, and that thereafter I was informed that you approved of the purchase of a certain portion of the property owned by Mr. Payne.

Mr. Payne has now executed a deed conveying to the City of El Paso all of Blocks 5, 6, 10, 11, and 12, and Block 7, except Lots 1 to 6 in said Block, in the Alamo Alto Townsite, in El Paso County, Texas, excluding therefrom a ten-foot easement across Blocks 5, 6, and 7, the net acreage being 15.7713 acres.

If satisfactory to you, the City will consummate this purchase immediately, and I will appreciate it if you will advise me as promptly as possible if such purchase meets with your approval.

Very truly yours,
(S.) R. F. MOMSEN,
(R. F. Momsen),
Assistant City Attorney.

"P-118".

February 12, 1942

Mr. R. F. Momsen
Assistant Attorney, City of El Paso
El Paso, Texas

Dear Mr. Momsen:

We reply to your letter of February 11 concerning the purchase of lands described as all of Blocks 5, 6, 10, 11, 12 and Block 7, except Lots 1 to 6 in said block, in the Alamo Alto Townsite Subdivision of El Paso County, Texas. The said purchase, we understand, is being made under the terms of the contract, dated February 18, 1941, between the United States, the City of El Paso and El Paso County Water Improvement District Number One. Having considered this matter carefully, we find that the proposed purchase will not interfere with the official operation of the District or materially impair the economic status of any community therein, and it is accordingly approved.

Very truly yours,
ROLAND HARWELL,
Manager.

RH:M
cc: L. R. Fiock
Louis A. Scott

"P-119".

The City of El Paso, Texas

(Seal)

Legal Department
910 Bassett Tower

J. E. Anderson
Mayor

Frank B. Clayton
City Attorney
Reuben F. Momsen
Theodore Andress
Abner S. Lipscomb
Assistants

August 28, 1942

Mr. Roland Harwell
El Paso National Bank Building
El Paso, Texas

Dear Mr. Harwell:

The City of El Paso, Texas, is contemplating the purchase of Tracts 10 and 11, Block 24, Socorro Grant, and Tract 3, Block 60, San Elizario Grant, in El Paso County, Texas.

I would appreciate it if you advise me whether or not the El Paso Valley Water Users Association will consent to the purchase of the above property by the City of El Paso and the transfer of water rights from said property to the new Water Treatment Plant Project of the City of El Paso, Texas.

Very truly yours,
(S.) R. F. MOMSEN,
(R. F. Momsen),
Assistant City Attorney.

"P-120".

September 10, 1942

Mr. R. F. Momsen
Assistant City Attorney
910 Bassett Tower
El Paso, Texas

Dear Mr. Momsen:

We reply to your letter of August 28 concerning the purchase of lands described as Tracts 10, 11, Block 24, Socorro Grant; and Tract 3, Block 60, San Elizario Grant, under the terms of the contract dated September 18, 1941, between the United States, City of El Paso and the El Paso County Water Improvement District No. 1.

Having considered this matter carefully, we find that the proposed purchase of land herein above described will not interfere with the successful operation of the District or materially impair the economic status of any community therein; and such purchase is accordingly approved.

Very truly yours,
ROLAND HARWELL,
Manager.

RH-mjb

"P-121".

Law Offices
Norcop & Momsen
Bassett Tower
El Paso, Texas

A. W. Norcop
R. F. Momsen
....
W. C. Roche
Mexico Practice

September 18, 1942

El Paso County Water Improvement District No. 1
El Paso National Bank Building
El Paso, Texas

Gentlemen:

Attention—Mr. Harwell

The City of El Paso is interested in the purchase of 80 acres of land out of Tract 5, in Block 62, of the San Elizario Grant, in El Paso County, Texas.

Kindly advise me whether or not the purchase of above property by the City and its use in connec- with the successful operation of the District or ma- terially impair the economic system of any com- munty within the District.

Very truly yours,
(S.) R. F. MOMSEN,
(R. F. Momsen),
Assistant City Attorney.

"P-122".

September 25, 1942

Mr. R. F. Momsen
Assistant City Attorney
Bassett Tower
El Paso, Texas

Dear Mr. Momsen:

We reply to your letter of September 18, 1942 concerning the proposal of the City of El Paso to purchase eighty acres of land out of Tract 5, Block 62 of the San Elizario Grant under the terms of the contract entered into by the U. S. Bureau of Reclamation, the El Paso County Water Improvement District, and the City of El Paso providing for a municipal water supply.

It is found that the purchase herein above referred to will not interfere with the successful operation of the District or materially impair the economic status of any community therein, and is accordingly approved.

Very truly yours,
ROLAND HARWELL,
Manager.

RH-mjb

"P-123".

The City of El Paso, Texas

(Seal)

Legal Department
910 Bassett Tower

J. E. Anderson
Mayor

Theodore Andress
City Attorney
Reuben F. Momsen
Abner S. Lipscomb
Assistants

October 5, 1942

El Paso County Water Improvement District No. 1
El Paso National Bank Building
El Paso, Texas

Gentlemen:

Attention—Mr. Harwell

The City of El Paso is interested in the purchase of the following properties:

30 acres out of Tract No. 9, Block 59, San Elizario Grant, El Paso County, Texas;

6.82 acres out of Tract 6-P, Block 57, San Elizario Grant, El Paso County, Texas;

7.84 acres in Tract 6, Block 34, San Elizario Grant, El Paso County, Texas.

Kindly advise me whether or not the purchase of the above property by the City and its use in connection with its Water Treatment Plant will interfere with the successful operation of the District or ma-

terially impair the economic system of any community within the District.

Very truly yours,
(S.) R. F. MOMSEN,
(R. F. Momsen),
Assistant City Attorney.

"P-124".

The City of El Paso, Texas

(Seal)

Legal Department
910 Bassett Tower

J. E. Anderson
Mayor

Theodore Andress
City Attorney
Reuben F. Momsen
Abner S. Lipscomb
Assistants

October 26, 1942

El Paso County Water Improvement District No. 1
El Paso National Bank Building
El Paso, Texas

Gentlemen:

Attention—Mr. Harwell

The City of El Paso is interested in the purchase of the following properties:

The North Half of Tract 4, Block 60, San Elizario Grant, in El Paso County, Texas, containing 45.97 acres.

Tract 6-P, in Block 60, San Elizario Grant, in El Paso County, Texas, containing 45.97 acres.

Kindly advise me whether or not the purchase of the above property by the City and its use in connection with its Water Treatment Plant will interfere with the successful operation of the District or materially impair the economic system of any community within the District.

Very truly yours,
(S.) R. F. MOMSEN,
(R. F. Momsen),
Assistant City Attorney.

"P-125".

November 5, 1942

Mr. R. F. Momsen
Assistant City Attorney
910 Bassett Tower
El Paso, Texas

Dear Mr. Momsen:

We reply to your letters of October 5th and 26th with respect to the purchase of certain lands, hereinafter listed, for the purpose of transferring use of water apertinent thereto under the terms of the contract dated February 18, 1941 between the United States, City of El Paso, and El Paso County Water Improvement District No. 1:

The north half of Tract 4, Block 60, San Elizario Grant, El Paso County, Texas, containing 47.00 acres

Tract 6-P, Block 60, San Elizario Grant, El Paso County, Texas, containing 45.97 acres

Tract 9, Block 59, San Elizario Grant, El Paso, Texas, containing 30.00 acres

Tract 6-P, Block 57, San Elizario Grant, El Paso County, Texas, containing 6.82 acres

Tract 6, Block 34, San Elizario Grant, El Paso County, Texas, containing 7.84 acres.

Having considered this matter carefully, we find that the proposed purchases will not interfere with the successful operation of the District or materially impair the economic status of any community therein, and are accordingly approved.

Very truly yours,

ROLAND HARWELL,
Manager.

RH-mjb.

"P-126".

City of El Paso, Texas

(Seal)

Executive Dept.

J. E. Anderson,
Mayor

W. R. Collins,
City Clerk

Aldermen
W. Henry Wooldridge
Dept. Water & Eng.
D. L. P. Duke,
Dept. of Public Safety
Chas. E. Graham
Dept. Parks & Recreation
Harris Walthall
Dept. of Public Health
and Finance

December 22, 1942

El Paso County Water Users Assn.
El Paso National Bank Building
El Paso, Texas

Attention: Mr. Harwell

Dear Sir:

The City of El Paso is considering the purchase of the following tracts of land:

Tracts 10, 12, 15, and 16 in Block 24, Tract 35 in Block 21, and Tract 17 in Block 12, all in the Socorro Grant.

We would appreciate your advising us whether or not the purchase of said tracts by the City for the purpose of using the water rights therefrom, in

connection with its water treatment plant, would meet with the approval of your district.

Yours very truly,
(S.) R. F. MOMSEN,
(R. F. Momsen),
Assistant City Attorney.

"P-127".

The City of El Paso, Texas

(Seal)

Legal Department

J. E. Anderson
Mayor

Theodore Andress
City Attorney
Reuben F. Momsen
Abner S. Lipscomb
Assistants

January 4th, 1943.

El Paso County Water Improvement District,
El Paso National Bank Building,
El Paso, Texas.

Attention Mr. Harwell.

The City contemplates the purchase of about 18 acres of land in the Northeast part of Tract 16, Block 12, Socorro Grant, same being all that portion of said tract Northeast of the Franklin Drain. The City also contemplates the purchase of Tract No. 14 A, Block 12, Socorro Grant, containing approximately 18.73 acres.

Will you kindly advise me as soon as possible whether or not it is agreeable with your District for the City to purchase said tracts of land and use the water rights in connection with its water treatment plant?

Very truly yours,
(S.) R. F. MOMSEN,
Assistant City Attorney.

RFM:LG

"P-128".

January 6, 1943

Mr. R. F. Momsen
Assistant Attorney
City of El Paso
Bassett Tower
El Paso, Texas

Dear Mr. Momsen:

We reply to your letters of December 22, 1942 and January 4, 1943 concerning the purchase of lands described as Tracts 10, 12, 15 and 16 in Block 24; Tract 35 in Block 21; and Tracts 14-A and 16 in Block 12; all in the Socorro Grant according to the re-survey of El Paso County, Texas.

The proposed purchase, we understand, is being made under the terms of the contract dated February 18, 1941 between the United States, the City of El Paso, and El Paso County Water Improvement District No. 1.

Having investigated the lands involved in this proposed purchase, we find that such purchase and use will not interfere with the operation of the District or

materially impair the economic status of any community therein.

Very truly yours,
ROLAND HARWELL,
Manager.

RH-mjb

"P-129".

City of El Paso, Texas

(Seal)

Executive Department

J. E. Anderson
Mayor
W. R. Collins
City Clerk

Aldermen
W. Henry Wooldridge
Dept. Water & Eng.
D. L. P. Duke
Dept. of Public Safety
Chas. E. Graham
Dept. of Parks & Rec.
Harris Walthall
Dept. of Public Health
& Finance

January 13, 1943

Mr. Rowland Harwell,
c/o El Paso County Water Impr. Dist. No. 1
El Paso National Bank Bldg.
El Paso, Texas

Dear Mr. Harwell:

The City of El Paso is contemplating the purchase of 22.96 acres of land out of Tract 4, Block 12, San Elizario Grant. The portion that the City contem-

plates purchasing is all of said tract of land lying south and west of the middle drain which intersects said tract of land, the purpose of said purchase being to acquire first-class water rights in connection with the operation of the Water Treatment Plant.

Would you kindly advise whether or not the purchase of this land by the City would nterfere with the operation of your project and whether or not you consent to the same being purchased by the City for the above-stated purpose.

Yours very truly,
(S.) R. F. MOMSEN,
(R. F. Momsen),
Ass't. City Attorney.

RFM/j

"P-130".

The City of El Paso, Texas

(Seal)

Legal Department

J. E. Anderson
Mayor

Theodore Andress
City Attorney
Reuben F. Momsen
Abner S. Lipscomb
Assistants

January 15, 1943.

Mr. Rowland Harwell,
c/o El Paso County Water Imp. Dist. No. 1,
El Paso National Bank Bldg.
El Paso, Texas.

Dear Mr. Harwell:

The City of El Paso is contemplating the purchase of tracts 2-A and 2-E, Block 4, Socorro Grant, the

purpose of said purchase being to acquire first class water rights in connection with the operation of the Water Treatment Plant.

Would you kindly advise whether or not the purchase of this land by the City would interfere with the operations of your project, and whether or not you consent to the same being purchased by the City for the above stated purpose.

Yours very truly,
(S.) R. F. MOMSEN,
(R. F. Momsen),
Ass't. City Attorney.

RFM:LG

"P-131".

The City of El Paso, Texas

(Seal)

Legal Department
910 Bassett Tower

J. E. Anderson
Mayor

Theodore Andress
City Attorney
Reuben F. Momsen
Abner S. Lipscomb
Assistants

January 27, 1943

Mr. Roland Harwell
El Paso County Water Improvement District No. 1
El Paso National Bank Building
El Paso, Texas

Dear Mr. Harwell:

The City of El Paso, Texas is contemplating the purchase of Tract 4, Block 6, Lower Valley, the pur-

pose of said purchase, being to acquire first-class water rights in connection with the operation of the Water Treatment Plant.

Will you kindly advise whether the purchase of this land by the City would interfere with the operation of your project, and whether you consent to the same being purchased by the City for the above stated purpose.

Very truly yours,
(S.) R. F. MOMSEN,
(R. F. Momsen),
Assistant City Attorney.

"P-132".

February 5, 1943

Mr. R. F. Momsen
Assistant City Attorney
910 Bassett Tower
El Paso, Texas

Dear Mr. Momsen:

We reply to your letters of January 13, 15, and 27, 1943 concerning the purchase of lands described as 22.96 acres out of Tract 4, Block 12, San Elizario Grant; Tracts 2-A and 2-E, Block 4, Socorro Grant; and Tract 4, Block 6, Lower Valley; all according to the resurvey of El Paso County, Texas.

The proposed purchases, we understand, are being made under the terms of the Contract dated February 18, 1941, between the United States, the City of El Paso, and El Paso County Water Improvement District No. One

Having investigated the lands involved in the proposed purchases, we find that such purchases and use will not interfere with the operation of the District or materially impair the economic status of any community therein.

Very truly yours,
ROLAND HARWELL,
Manager.

RH-mjb

"P-133".

The City of El Paso, Texas

(Seal)

Legal Department
910 Bassett Tower

J. E. Anderson
Mayor

Theodore Andress
City Attorney
Reuben F. Momsen
Abner S. Lipscomb
Assistants

February 2, 1943

Mr. Roland Harwell
El Paso County Water Improvement District No. 1
El Paso National Bank Building
El Paso, Texas

Dear Mr. Harwell:

The City of El Paso is contemplating the purchase of Track No. 1, in Block 45, of the San Elizario Grant, containing 63.54 acres, the purpose of said pur-

chase being to acquire first-class water rights in connection with the operation of the Water Treatment Plant.

Will you kindly advise whether the purchase of this land by the City would interfere with the operation of your Project, and whether you consent to the same being purchased by the City for the above stated purpose?

Very truly yours,
(S.) R. F. MOMSEN,
(R. F. Momsen),
Assistant City Attorney.

P

"P-134".

February 22, 1943

Mr. R. F. Momsen
Assistant City Attorney
910 Bassett Tower
El Paso, Texas.

Dear Mr. Momsen:

We reply to your letter of February 2, 1943 concerning the purchase of lands described as Tract 1 in Block 45 of the San Elizario Grant according to the resurvey of El Paso County, Texas, containing 63.54 acres.

The proposed purchase, we understand, is being made under the terms of the Contract dated February 18, 1941, between the United States, the City of El Paso, and El Paso County Water Improvement District No. One.

Having investigated the lands involved in the proposed purchase, we find that such purchase and use will not interfere with the operation of the District or materially impair the economic status of any community therein.

Very truly yours,
ROLAND HARWELL,
Manager.

RH-mjb

"P-135".

The City of El Paso, Texas

(Seal)

Legal Department
910 Bassett Tower

J. E. Anderson
Mayor

Theodore Andress
City Attorney
Reuben F. Momsen
Abner S. Lipscomb
Assistants

May 20, 1943

El Paso County Water Improvement District No. 1
El Paso National Bank Building
El Paso, Texas

Attention—Mr. Harwell

Gentlemen:

The City of El Paso is contemplating the purchase from Scott Skidmore of 951 acres of land located in Tract 1-H, Block 15, in the Ysleta Grant.

The City desires to consummate this proposed purchase under the terms of the contract dated February 18, 1941, between the United States, the City of El Paso, and the El Paso County Water Improvement District No. 1.

I enclose a copy of the field notes covering this tract of land.

Will you kindly advise whether in your opinion the purchase of this land by the City of El Paso would interfere with the operation of the District or materially impair the economic status of any community thereof.

Very truly yours,
(S.) R. F. MOMSEN,
(R. F. Momsen),
Assistant City Attorney.

P
Enclosure

"P-136".

City of El Paso, Texas

Department of Water and Sewerage

J. E. Anderson
Mayor

Ashley G. Classen
Supt.

November 10, 1943

El Paso County Water Improvement District No. 1,
El Paso National Bank Building,
El Paso, Texas.

Attention: Mr. Roland Harwell, Manager

Gentlemen:

In accordance with the provisions of Section 9(a) of a contract to supply water to the City of El Paso

for municipal purposes, dated February 18, 1941, notice is hereby given that the City of El Paso, Texas, as of November 1, 1943, has acquired and has clear title to a total of 1,137.23 acres of first-class water right, said acreage being contained in the various tracts in El Paso County Water Improvement District No. 1 designated and described as follows:

Block No.	Tract No.	Survey or Grant	Taxable Acres
9	3	Lower Valley	117.02
9	2	Lower Valley	166.51
4	2F	Socorro	31.46
5	2A & 1B	San Elizario	6.47
8	2	Lower Valley (Alamo Alto)	15.80
41	5B	Ysleta	0.84
36	6	San Elizario	18.69
21	7	San Elizario (Clint)	2.75
60	3A	San Elizario	99.10
24	10A	Socorro	13.37
24	11	Socorro	10.86
62	5B	San Elizario	80.00
59	9B	San Elizario	30.00
60	4B	San Elizario	88.45
24	15	Socorro	14.00
24	16	Socorro	20.04
24	10B	Socorro	1.13
21	35	Socorro	10.93
24	12B	Socorro	48.57
34	6	San Elizario	7.84
60	6P	San Elizario	95.97
57	6P	San Elizario	6.82
12	4A	San Elizario	22.96
12	16C	Socorro	17.66
12	14A	Socorro	18.73

Block No.	Tract No.	Survey or Grant	Taxable Acres
1	1	Socorro	24.29
15	1 H-L	Ysleta	9.51
4	2A	Socorro	8.82
4	2E	Socorro	32.04
6	4	Lower Valley	116.60
	Total	Taxable Acres	1,137.23

Effective January 1, 1944, the City will begin to take delivery of that quantity of water which the above-described acquired lands held by the City will be entitled to receive from the project water supply. It is contemplated that the quantity taken each day will vary from a minimum of nine (9) acre feet to a maximum of twenty-one (21) acre feet.

Evidence of the City's ownership of the acquired lands above described may be found in the deed records at the County Clerk's office of El Paso County.

In accordance with Section 10 (a) (2) of the aforesaid contract, providing for a power of attorney executed on behalf of the City of El Paso, authorizing the District as attorney in fact for the City to offer for sale, etc., may we suggest that arrangements for compliance with this provision by the City be made by the duly designated legal representatives of the City and the District?

Yours very truly,

(S.) ASHLEY G. CLASSEN,

(Ashley G. Classen),

Superintendent.

agc/k

"P-137".

City of El Paso, Texas

Department of Water and Sewerage

J. E. Anderson
Mayor

Ashley G. Classen
Supt.

January 12, 1944

El Paso County Water Improvement District No. 1,
El Paso National Bank Building,
El Paso, Texas.

Attention: Mr. Roland Harwell, Manager

Gentlemen:

Since writing you our letter of November 10, 1943, itemizing the lands owned by the City of El Paso in El Paso County Water Improvement District No. 1 having first-class water right, the City of El Paso has consummated a transaction by Ballard Coldwell, exchanging 13.65 acres out of the northerly portion of Tract 2E, Block 4, Socorro Grant for three smaller tracts described as follows:

3.45 acres being a portion of Tract 3, Block 27, Socorro Grant, 8.03 acres being a portion of Tract 4, Block 13, San Elizario Grant, 2.25 acres being a portion of Tract 11, Block 32, San Elizario Grant;

the three aforesaid tracts containing 13.73 acres. Thus, in the exchange, the City gained 0.08 acres of first-class water right, which, for all practical pur-

poses, results in the same amount of the acreage held by the City prior to the trade or exchange.

Will you, therefore, kindly make this notation in your records in order that the assessments against the City for the current year coincide with the acreage actually owned by the City?

Thanking you, I am

Yours very truly,
(S.) ASHLEY G. CLASSEN,
(Ashley G. Classen),
Superintendent.

AGC/k

"P-138".

City of El Paso,
El Paso, Texas

Superintendent, U. S. Bureau of Reclamation
Rio Grande Project
El Paso, Texas

Gentlemen.

Pursuant to the contract entered into on the 18th day of February, 1941 by the United States of America, City of El Paso, and El Paso County Water Improvement District Number One, and particularly Article 11-D thereof, notice is hereby given that the advanced estimated charge for the year 1944 on account of the lands acquired by the City of El Paso as of January 1, 1944, is $6147.17.

Schedule showing the acquired lands herein covered, together with the estimated advance charges on each parcel thereof is attached to this communication.

Very truly yours,
ROLAND HARWELL,
General Manager.

RH-mjb

Schedule of Advance Estimated Charges for the Year 1944, on Lands Acquired by the City of El Paso Prior to January 1, 1944, Under Terms of the Contract Dated February 18, 1941.

Supporting Notice of the General Manager, El Paso County Water Improvement District No. 1 to the City of El Paso and the Superintendent of the Bureau of Reclamation, Rio Grande Project.

Description						Class I	Const. Repay	Maint. & Opr.	Service Charge	1½ A.F. Per Acre Add'nl	
Block	Tract	Grant	Lot	Block	Name	Acres	1/28	$2.90	$0.41	$0.30	Total
15	1H1	Ysl				9.51	$ 11.13	$ 27.58	$ 3.90	$ 4.28	$ 46.89
41	5B	Ysl				0.84	0.99	2.44	0.34	0.38	4.15
1	1	Soc				24.29	40.77	70.44	9.96	10.93	132.10
4	2A	Soc				8.82	15.80	25.58	3.62	3.97	48.97
4	Pt 2E	Soc				18.39	26.00	53.33	7.54	8.28	95.15
4	2F	Soc				31.46	40.25	91.23	12.90	14.16	158.54
12	14A	Soc				18.73	23.91	54.32	7.68	8.43	94.34
12	16C	Soc				17.66	20.59	51.21	7.24	7.95	86.99
21	35	Soc				10.93	12.87	31.70	4.48	4.92	53.97
24	10A	Soc				13.37	16.13	38.77	5.48	6.02	66.40
24	10B	Soc				1.13	1.36	3.28	0.46	0.51	5.61
24	11	Soc				10.86	10.28	31.49	4.45	4.89	51.11
24	12B	Soc				48.57	58.18	140.85	19.91	21.86	240.80
24	15	Soc				14.00	19.68	40.60	5.74	6.30	72.32
24	16	Soc				20.04	37.02	58.12	8.22	9.02	112.38
27	Pt 3	Soc				3.45	4.27	10.01	1.41	1.55	17.24
5	2A, 1B	S.E.				6.47	11.25	18.76	2.65	2.91	35.57
12	4A	S.E.				22.96	38.07	66.58	9.41	10.33	124.39
13	4	S.E.				8.03	11.37	23.29	3.29	3.61	41.56
21	7	S.E.	Trs	12-15	Clint	2.75	3.20	7.98	1.13	1.24	13.55
32	Pt. 11	S.E.				2.25	3.29	6.53	0.92	1.01	11.75
34	6	S.E.				7.84	14.64	22.74	3.31	3.53	44.12
36	6	S.E.				18.69	26.72	54.20	7.66	8.41	96.99
57	6P	S.E.				6.82	16.42	19.78	2.80	3.07	42.07
59	9B	S.E.				30.00	38.90	87.00	12.30	13.50	151.70
60	3A	S.E.				98.60	127.37	285.94	40.43	44.37	498.11
60	4B	S.E.				88.45	116.98	256.51	36.26	39.80	449.55
60	6P	S.E.				95.97	231.07	278.31	39.35	43.19	591.92
62	5B	S.E.				80.00	103.69	232.00	32.80	36.00	404.49
6	4B	L.V.				116.00	238.96	338.14	47.81	52.47	677.38
8	2	L.V.	1-32	5	Alamo	15.80	28.76	45.82	6.48	7.11	88.17

"P-139".

Resolution.

Whereas, on the 18th day of February, 1941, the City of El Paso, Texas, entered into a contract with the United States of America and the El Paso County Water Improvement District No. 1, under and by virtue of the terms of which the City was to acquire a supplemental water supply; and

Whereas, said contract requires the City of El Paso, Texas to execute a power of attorney to the El Paso Water Improvement District No. 1 as to all acquired lands, authorizing said District as attorney-in-fact for the City to offer for sale, and sell and convey said acquired lands under certain terms and conditions as described in said contract; and

Whereas, the City now has in operation its new Water Treatment Plant and desires to comply with the terms of said contract by executing said power of attorney;

Now, Therefore, Be It Resolved By The City Council of the City of El Paso, Texas that J. E. Anderson be and he is hereby directed to execute on behalf of the City of El Paso the attached form of power of attorney to the El Paso County Water Improvement District No. 1.

Passed and Approved this 14th day of January, A. D. 1944.

(S.) J. E. ANDERSON.
Mayor.

Attest:
(S.) W. R. COLLINS.
City Clerk.

I, W. R. Collins, City Clerk, do hereby certify that the foregoing Resolution is a true and correct copy of Resolution adopted by the City Council of the City of El Paso, Texas on January 14, A. D. 1944.

(S.) W. R. COLLINS.

State of Texas,
County of El Paso.

Whereas, on February 18, 1941, a contract was entered into between the United States of America, the City of El Paso, Texas, a municipal corporation organized and existing under the laws of the State of Texas, and El Paso County Water Improvement District No. 1, a water improvement district organized and existing under and by virtue of the laws of Texas, whereby the City of El Paso is to acquire a supplemental water supply in accordance with the terms and conditions of said contract, copy of which is attached hereto and made a part hereof, and

Whereas, Article 10 (a) (2) of said contract requires the City of El Paso, Texas, to execute and deliver to the manager of El Paso County Water Improvement District No. 1 a power of attorney designating and appointing said District as attorney-in-fact for the City to offer for sale and sell and convey "acquired lands", as defined in the contract, under the circumstances and conditions, in the manner, to the persons, and for the consideration specified in said contract, and to receive the consideration for such sales and apply same in the manner directed by sub-section (c) of said Article, and

Whereas, on the 14th day of January, 1944 the City Council of the City of El Paso, Texas, adopted a resolution authorizing the Mayor and City Clerk of

said city to execute and deliver this power of attorney, certified copy of such resolution, being attached hereto.

Now, Therefore, Know All Men By These Presents:

That the City of El Paso, Texas, acting by its Mayor and Clerk pursuant to the requirements of said contract and authority of said resolution, ad made, constituted and appointed, and by these presents does make, constitute and appoint, El Paso County Water Improvement District No. 1 its true and lawful attorney-in-fact for it and in its name, place and stead, to make sales of "acquired lands", as defined in said contract, under the conditions and circumstances, in the manner, to the persons, and for the consideration therein specified; to receive all amounts of money for which said lands may be sold and to apply same to the uses and purposes and in the manner specified in said contract; to execute and deliver all forms and kinds of conveyances necessary to pass title to any and all lands sold, with such covenants of warranty and other conditions as said District may deem proper; to execute any and all necessary or proper receipts, releases and discharges incident to any sale; to do any and all acts and exercise any and every power in connection with the making of such sales that the City of El Paso might or could do if acting through its duly constituted officers, agents and representatives, or that said City might or could do if acting through any other person, hereby giving and granting to said District full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, whether herein particularly specified or not, hereby

ratifying and confirming whatsoever said District shall and may do by virtue hereof in the premises.

This power of attorney shall be irrevocable for the length of time specified in Article 10 (a) of said contract, but nothing herein contained shall prevent the City from making sales and conveyances of "acquired lands" under the terms of the proviso contained in subsection (a) of said Article, or under the provisions of sub-section (d) of said Article.

This power of attorney shall extend to any successor or assign of El Paso County Water Improvement District No. 1 and shall be binding upon any successor or assign of the City, as provided in Article 21 of the contract.

Executed This 14th day of January, 1944.

CITY OF EL PASO, TEAS.
By (Signed) J. E. ANDERSON,
Mayor.

Attest:
(Signed) W. R. COLLINS,
Clerk.

State of Texas.
County of El Paso.

Before Me, the undersigned authority, on this day personally appeared J. E. Anderson, Mayor of the City of El Paso, Texas known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that the City of El Paso, acting by and through him as Mayor, thereunto duly authorized, had executed said instrument for the purposes and consideration therein expressed, and he, the said J. E. Anderson, further acknowledged

that he executed said instrument in the capacity and for the purposes and consideration therein stated.

Given Under My Hand and Seal of Office this 14th day of January, 1944

(S.) G. R. DANIELS,
(G. R. Daniels),
(Seal) Notary Public, El Paso County, Texas.

My commission expires May 31, 1945.

United States
Department of the Interior
Bureau of Reclamation
Rio Grande Project
New Mexico-Texas

Contract to supply Water to the City of El Paso for Municipal Purposes.

This contract made this 18th day of February, 1941, in pursuance of the Reclamation Law, between the United States of America, represented by the Officer executing this contract, and the City of El Paso, a municipal corporation organized and existing under and by virtue of the laws of the State of Texas, and the El Paso County Water Improvement District No. 1, a water improvement district and body politic organized and existing under and by virtue of the laws of the State of Texas.

Witnesseth: That:

Definition of Terms.

2. As used herein, unless otherwise indicated, the following abbreviated terms have the respective meanings set out after each term as follows:

(a) United States—United States of America.

(b) Reclamation Law—the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, and in particular the Act of February 25, 1920 (41 Stat. 451)

(c) Secretary—Secretary of the Interior.

(d) City—the City of El Paso in the County of El Paso in the State of Texas.

(e) District—the El Paso County Water Improvement District No. 1, in the County of El Paso in the State of Texas.

(f) Elephant Butte District—the Elephant Butte Irrigation District, an irrigation district organized and existing under and by virtue of the laws of the State of New Mexico.

(g) Project—the Rio Grande Federal Reclamation project in New Mexico and Texas.

(h) Project Works—Elephant Butte and Caballo dams and reservoirs, ancillary diversion dams, distribution and drainage works and all works constructed by the United States, in whole or in part, pursuant

to the Reclamation Law in connection with the project.

(i) District Water Right Lands—lands, within the boundaries of the District, which are subject to the payment of District assessments for charges, including those made to meet the District's obligations to the United States under existing contracts for the repayment of construction costs.

(j) Acquired Lands—those District water right lands (including the legal and equitable title thereto) which have been or will in the future be acquired by the City.

(k) Water Charges—all District charges, regular or special assessments, and tolls to which District water right lands and the owners thereof are subject.

(l) Year—calendar year.

(m) Water Year—the period from and including October 1 of any year to and including Sept. 30 of the succeeding year.

(n) Project Superintendent—the Superintendent of the project.

(o) City's Superintendent—the superintendent of the City's water department.

(p) Qualified Landowner—an owner of District water right lands, who is (and in case of a proposed transfer to such owner of lands by the City, an owner who upon acquisition of the lands proposed to be transferred to him would be) entitled to receive water

from the project supply for such lands under provisions of the Reclamation Law, Rules and Regulations pursuant thereto, and the contracts, authorized thereunder, between the District and the United States.

(q) Manager—the General Manager of the El Paso County Water Improvement District No. 1, or such other officer of the District as may be designated by the Board of Directors of the District to act in the place of the General Manager.

(r) Advance Estimated Charge—the aggregate sum estimated by the Manager as the total amount of water charges, including charges or assessments for construction repayment, reservoir service, operation and maintenance, additional water, and all other charges or assessments, however designated, applicable in any year to District water right lands, and which would become due and payable to the District on account of acquired lands for the water year ending on the following September 30 of such year, if such acquired lands were in private ownership during such water year and were receiving delivery of three and one-half (3½) acre-feet of water for each acre of such lands.

(s) Actual Charge—the aggregate sum set out in the notice of the Manager as the total amount of water charges, including charges or assessments for construction repayment, reservoir service, operation and maintenance, additional water, and all other charges or assessments, howsoever designated, which would have become due and payable to the District on account of acquired lands for the water year ending on the preceding September 30, if such acquired

lands had remained in private ownership as District water right lands and had received in such water year on account of which such notice is given (a) a quantity of water equal to that delivered to the City during such water year under the provisions of this contract, or (b) no water, as to any such water year in which the City shall have been entitled to have received water under the provisions of this contract but in which no water shall have been delivered to the City.

Recitals.

3. Whereas, the United States, pursuant to the Reclamation Law, has constructed and is operating and maintaining the project, including the project works, and

4. Whereas, the District and the Elephant Butte District have heretofore severally contracted with the United States, pursuant to the Reclamation Law, to repay certain project construction costs and to pay in advance certain other cost, and

5. Whereas, the City which now owns and operates a municipal water system, including deep wells, reservoirs and distribution works, needs and desires to procure from the project water supply a supplemental water supply to meet the present and anticipated future needs of the City and its inhabitants; and there is available to the City no practicable source of such supplemental water supply other than the said project water supply; and the delivery of water to the City as herein provided will not be detrimental to the water service for the project or to the rights

of any prior appropriator and will be in accordance with the provisions of the Act of February 25, 1920 (41 Stat. 451), and

6. Whereas, the City for the purpose of securing a supplemental municipal water supply from the project water supply without interference to the water supply of other District water right lands, proposes to acquire not to exceed two thousand acres of District water right lands, and desires to receive each year from the project water supply an amount of water not to exceed the amount of water which such acquired lands would be entitled to receive from said water supply for the respective year; if held in private ownership of qualified project landowners, which will in no event be in excess of three and one-half (3½) acre-feet of water a year for each acre of such acquired land.

7. Now, Therefore, for and in consideration of the mutual covenants and promises herein contained the parties hereto agree as follows:

City to Provide Diversion Facilities.

8. The City shall provide, without cost to the District or the United States, in such location and in accordance with such plans and specifications and construction practices as may be approved by the Project Superintendent, suitable facilities for diversion of water from the Rio Grande or the project works, and, without cost to the District or the United States, shall maintain the same in a condition satisfactory to the Project Superintendent, throughout the time during which the City may be entitled to re-

ceive water delivery hereunder. The City will remove these diversion facilities and restore the project works at the location of such facilities to their former condition within ninety (90) days after the termination, as provided in Article 13 (a) hereof, of the City's right to receive water; provided, however, that if the City should fail so to remove its diversion facilities and so restore the said premises within such 90-day period, the United States, at its option, may do so and the City shall pay to the United States the cost of such removal and restoration within thirty (30) days from receipt of a bill of such cost.

Delivery of Water to City.

9(a). After completion of the City's diversion facilities and subject to the applicable provisions of the Reclamation Law and to compliance with the provisions of this contract, there shall be delivered, in each water year, to the City at the City's diversion facilities a quantity of water not to exceed the lesser of these amounts of water:

(i) the quantity that can be used beneficially for municipal purposes.

(ii) the total quantity which, in such water year the acquired lands held by the City would have been entitled to receive from the project water supply had they been owned and held by private qualified landowners.

(iii) an amount equivalent to three and one-half (3½) acre-feet of water per acre for each acre of acquired land held by the City in such water year.

(b) The water so to be delivered will be delivered upon request of the City's Superintendent in accordance with such detailed schedule of delivery as may be agreed on from time to time between the Project Superintendent and the City's Superintendent: Provided, That in no event shall deliveries be made by the release of stored water from project storage reservoirs except at times when that stored water is being released for irrigation of lands served from a project diversion point in the immediate vicinity of or below the City's point of diversion.

Acquired Lands.

10(a) Before delivery of water to the City as provided in Article 9 hereof and on or before January 31, 1941, in the event the City has acquired lands prior to that date, and thereafter, as to any acquired lands subsequently acquired by the City and within ten (10) days of such subsequent acquisition, the City's Superintendent shall deliver to the Manager:

(1) Evidence of the City's ownership of acquired lands.

(2) A Power of Attorney duly executed on behalf of the City, authorizing the District as attorney in fact for the City to offer for sale, and sell and convey to the highest and best bidder, who shall be a qualified landowner, for cash at public auction after notice of such sale published once a week for three consecutive weeks in a newspaper of general circulation in El Paso County, Texas, any of said lands held by the City after the expiration of ninety (90) days from the effective date of the termination of the City's right to receive water under the provisions of

this agreement as provided for in Article 13 (a) hereof. Such power of attorney shall continue in force from the date of its delivery until the expiration of one year from and after the effective date of such termination of the City's right to receive water: Provided, that notwithstanding such power of attorney, the City may at any time prior to the date of the termination of the City's right to receive water hereunder, convey unconditionally any of the acquired lands to qualified landowners without the execution of additional instruments by the District for the release of the District's power of attorney.

(b) Within ten (10) days from the effective date of any conveyance from the City of any acquired lands the City shall submit to the District Manager evidence of such conveyance, but such disposition of any such acquired land shall not entitle the City to any refund or credit upon any part of any advance estimated charge or actual charge theretofore becoming due from the City when the computation of such charge included the acquired lands disposed of by the City.

(c) The proceeds from the sale of any land made under the power of attorney provided for in this article shall be applied first to pay the reasonable costs of making such sale and next to the payment to the United States of any amount at the time of such sale remaining due and unpaid to the United States pursuant to this contract, and any amount of such proceeds thereafter remaining shall be paid to the City.

(d) Upon the termination of the City's right to receive water under the provisions of this agreement the City shall offer for sale and endeavor to sell and

4	2A	Soc				8.82	15.80	25.58	3.62	3.97	48.97
4	Pt 2E	Soc				18.39	26.00	53.33	7.54	8.28	95.15
4	2F	Soc				31.46	40.25	91.23	12.90	14.16	158.54
12	14A	Soc				18.73	23.91	54.32	7.68	8.43	94.34
12	16C	Soc				17.66	20.59	51.21	7.24	7.95	86.99
21	35	Soc				10.93	12.87	31.70	4.48	4.92	53.97
24	10A	Soc				13.37	16.13	38.77	5.48	6.02	66.40
24	10B	Soc				1.13	1.36	3.28	0.46	0.51	5.61
24	11	Soc				10.86	10.28	31.49	4.45	4.89	51.11
24	12B	Soc				48.57	58.18	140.85	19.91	21.86	240.80
24	15	Soc				14.00	19.68	40.60	5.74	6.30	72.32
24	16	Soc				20.04	37.02	58.12	8.22	9.02	112.38
27	Pt 3	Soc				3.45	4.27	10.01	1.41	1.55	17.24
5	2A, 1B	S.E.				6.47	11.25	18.76	2.65	2.91	35.57
12	4A	S.E.				22.96	38.07	66.58	9.41	10.33	124.39
13	4	S.E.				8.03	11.37	23.29	3.29	3.61	41.56
21	7	S.E.	Trs	12-15	Clint	2.75	3.20	7.98	1.13	1.24	13.55
32	Pt. 11	S.E.				2.25	3.29	6.53	0.92	1.01	11.75
34	6	S.E.				7.84	14.64	22.74	3.31	3.53	44.12
36	6	S.E.				18.69	26.72	54.20	7.66	8.41	96.99
57	6P	S.E.				6.82	16.42	19.78	2.80	3.07	42.07
59	9B	S.E.				30.00	38.90	87.00	12.30	13.50	151.70
60	3A	S.E.				98.60	127.37	285.94	40.43	44.37	498.11
60	4B	S.E.				88.45	116.98	256.51	36.26	39.80	449.55
60	6P	S.E.				95.97	231.07	278.31	39.35	43.19	591.92
62	5B	S.E.				80.00	103.69	232.00	32.80	36.00	404.49
6	4B	L.V.				116.00	238.96	338.14	47.81	52.47	677.38
8	2	L.V.	1-32	5	Alamo	15.80	28.76	45.82	6.48	7.11	88.17
			1-32	6	Alamo						
			7-32	7							
			1-32	10							
			1-32	11							
			1-32	12							
9	2	L.V.				166.51	282.12	482.88	68.27	74.93	908.20
9	3	L.V.				117.02	240.69	339.36	47.98	52.66	680.69
Total						1136.81	$ 1,872.73	$ 3,296.77	$ 466.08	$ 511.59	$ 6,147.17

convey any acquired lands then held by the City to qualified landowners.

(e) No water shall be delivered to acquired lands while the legal and equitable title thereto remains in the City or to any acquired land in any water year when such land was included in the computation of the advance estimated charge or the actual charge for such water year: Provided, That subject to the compliance by the City with the provisions of this contract, including the provisions of Article 11 relating to the payments to be made to the United States, until the City's diversion works and appurtenant structures are completed and in actual operation water may be delivered to not to exceed one hundred and sixty acres of such acquired land in the same manner and under the terms and conditions, not in conflict with the provisions of this contract, as if said lands were in private ownership of a qualified project landowner.

(f) The City will acquire its lands, only after consultation with the Manager, in a manner and in locations which will not interfere with the efficient operation of the District or materially impair the economic status of any community therein; it being hereby declared to be the intention of the parties hereto that the City will acquire its lands in such a manner as to result in the least practicable disturbance of the economic status of any community.

(g) Any sale, conveyance or disposition by the City, of acquired lands shall be only to qualified landowners.

(h) The City shall not acquire or retain title to District water right lands so as to hold, at any time, an aggregate amount thereof in excess of 2,000 acres.

Terms of Payment.

11 (a) The City agrees to pay to the United States, at the times and manner as herein provided, the charges provided for in this article.

(b) On or before May 1, 1941, the Manager shall give written notice to the City and the Project Superintendent of the advance estimated charge for the water year ending September 30, 1941, on account of acquired lands, as shown by the records of the Manager, held by the City on the date preceding the date of said notice. The City shall pay to the United States on or before June 1, 1941, an amount equal to this charge.

(c) On or before October 15, 1941, and on or before each October 15 thereafter, the Project Superintendent shall notify the Manager of the amount of water delivered to the City, pursuant to this contract, during the water year ending on the September 30 preceding such notification.

(d) On or before November 1, 1941, and on or before each November 1 thereafter the Manager shall give written notice to the City and to the Project Superintendent which notice shall show:

(1) The actual charge for the respective water year ending on the September 30 preceding such notice The notice of the actual charge shall separately designate the charges or assessments and the re-

spective amounts thereof included in said actual charge.

(2) The advance estimated charge for the current water year (that is the water year ending on the following September 30) on account of acquired lands, as shown by the records of the Manager, held by the City on the date preceding the date of the notice provided in this subsection of this article.

(e) The amount by which the advance estimated charge, including any supplemental advance estimated charge, paid by the City on account of any water year exceeds the actual charge on account of such water year shall be credited to the advance estimated charge next becoming due from the City to the United States, and the amount by which the actual charge on account of any water year exceeds the advance estimated charge, including any supplemental advance estimated charge, paid by the City on account of such water year shall be added to the advance estimated charge next becoming due to the United States from the City.

(f) On or before December 1, 1941, and on or before each December 1 thereafter the City shall and it hereby agrees to pay to the United States the amount of the advance estimated charge for the water year for which such charge is made, adjusted as provided in subsection (e) of this article.

(g) Within 10 days of receiving evidence of the City's ownership of acquired lands provided for in Article 10 (a) hereof, as to any acquired lands which were not included in the computation of the estimated amount in the preceding notice thereof on account of

the water year in which such showing is furnished by the City, the Manager shall give a supplemental written notice to the City and the Project Superintendent of the amount of the advance estimated charge for the then current water year arising by reason of the City's acquisition of such additional acquired lands, and the City shall and it hereby agrees to pay to the United States the amount thereof within fifteen (15) days from the giving of such supplemental written notice as aforesaid.

(h) Upon the termination of this contract, as in Article 13 hereof provided, any excess of the aggregate amount theretofore paid to the United States by the City over and above the aggregate amount, including advance estimated charges, becoming due to the United States pursuant to this Contract shall be refunded to the City.

Payments to be Credited to District's Obligations.

12(a) The United States, after receipt of any payment from the City pursuant to this contract, will cover the amount of such payment into the Reclamation Fund and will credit such payment, in the manner and in the amounts provided herein, upon payments to become due from the District to the United States under existing repayment contracts.

(b) Upon the determination of the actual charge for the water year, on account of which the City has paid any advance estimated charge, or supplemental advance estimated charge, such payment of payments, in a total amount not to exceed said actual charge, shall be credited upon the next installment

or payments due from the District to the United States, in accordance with the separate designation of the respective charges, and the respective amounts of each of such charges, as provided in Article 11 (d) (1), as follows:

(1) an amount equal to that designated as "construction charges" shall be credited upon the District's construction charge installment;

(2) an amount equal to that designated as "reservoir service charge" shall be credited upon the District's reservoir service charge;

(3) an amount equal to the sum of the amounts designated respectively as "maintenance and operation charge" and "special assessment for additional water" shall be credited upon the District's advance operation and maintenance charge;

(4) an amount equal to that in any designation other than those mentioned in subdivisions (1), (2) or (3) of this subsection of this Article shall be credited in such manner and upon such installments or charges thereafter becoming due to the United States from the District as may be determined by the Commissioner of the Bureau of Reclamation.

(c) If the amount of the payment by the City so to be credited is less than the amount of the actual charge for the water year on account of which such payment was made, then such payment shall be credited upon the next installment or payments due from the District to the United States to the corresponding designations set out in subsection (b) of this Article

the credit to each designated charge to bear the same proportionate relationship to that designated charge as the amount of the payment from the City to be credited bears to the amount of such actual charge.

Termination for Breach.

13 (a) All rights of the City to have delivered to it pursuant to this contract, or to take or receive any part of the project water supply, shall cease and terminate at the option of the United States upon the expiration of thirty (30) days from notice in writing of the exercise of such option, to be given to the City in the discretion of the Secretary.

(1) Upon failure by the City for a period of twelve (12) months to pay to the United States, after the same shall become due, any amount which may become due from the City to the United States under the provisions of this contract, or

(2) Upon breach by the City of any other of the terms and conditions of this contract, or

(3) Upon the entry of a valid and subsisting order or decree of a Court of competent jurisdiction by which it shall have been held that the City is without power to perform or contract for the performance of any of the matters and things undertaken by the City under the provisions of this contract or by which this contract shall have been held in whole or in part not to constitute a valid and binding agreement, or

(4) Upon failure of the City, within a period of five years from the effective date of this contract, to

have construcoted to substantial completion its diversion facilities as in Article 8 hereof provided, together with its water treatment plant for use in connection therewith, or

(5) Upon the failure of the City for one or more periods of any three consecutive years after the expiration of five years from the effective date of this contract to have held acquired lands to the extent of at least 500 acres.

(b) This contract shall terminate in its entirety and shall become of no further force and effect,

(1) at any time upon the written mutual agreement of the parties hereto, or

(2) whenever, after the termination of the City's right to delivery of water hereunder, as provided in subsection (a) of this Article, all acquired lands have been conveyed to qualified project landowners and all amounts then due to the United States under the provisions of this contract have been fully paid by the City.

(c) The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provision hereof or of a further breach of such provision.

Refusal to Deliver Water.

14. In the event that the City fails to pay any amount provided for in this contract when due, the United States may refuse to deliver water to the City until such payment is made. The provisions of this

Article are not exclusive and shall not in any manner preclude the United States from exercising any other remedy to enforce collection of payments provided herein.

Measurement of Water.

15. Before delivery of water to the City under the provisions of this contract the City shall, without cost to the United States or to the District, construct in a manner, at a location at the point of delivery of water to the City, in accordance with such plans and specifications as hereafter shall have been approved by the Project Superintendent, an adequate measuring device for the measurement of water delivered to the City under the provisions of this Contract; and the City shall maintain said measuring device in a condition satisfactory to the Project superintendent. The water which may be delivered to the City pursuant to this contract will be measured by the United States, and such measurements shall control for all purposes of this contract.

Control of Water by the City.

16. Upon receiving water delivered to the City pursuant to this contract at the City's point of diversion as herein provided, the City without cost to the United States or to the District, shall thereafter be responsible for the carriage, storage or distribution of the water so delivered; and the City shall and hereby does assume full responsibility for the control and handling of said water and for any damage for which there is legal liability, including damage, without excluding damage of the same or a different class, aris-

ing from personal injury or death that may result therefrom or in connection therewith after its delivery to the City as herein provided, and shall save the United States and the District harmless on account of any such damage.

Neither the United States nor the District Shall be Liable on Account of Shortage or Quality of Water.

17 Neither the United States nor the District shall be liable for damages to the City or its inhabitants or others for failure to supply water under this contract caused by insufficient supply of water in the Rio Grande, hostile diversion, drought, interruption of service made necessary by repairs, or on account of any other delivery of water than that herein stipulated for, directed or ordered to be made, by any valid or subsisting order, or decree of a competent Court or of any other duly constituted, competent authority; or for damages caused by floods, acts of hostility or unavoidable circumstances; or for damages of any character resulting from any lack of purity or potable quality of the water which may be delivered to the City under the terms of this contract, and the City agrees to hold the United States and the District harmless from any damage or claims of damage arising from said causes.

Status of Acquired Lands and Existing Contracts to Remain Unaffected.

18. Nothing in this contract, except as herein otherwise expressly provided, shall be construed as altering, modifying or amending existing contracts between the United States and the District. Nothing herein shall be construed as affecting the status of

acquired lands as being District water right lands within the project and within the boundaries of the District; and the status of such acquired lands, whenever the same shall have been transferred to private ownership, shall in so far as this contract is concerned, be and remain exactly as though such lands had never been acquired lands.

Penalty for Delinquency.

19. To every sum of money required to be paid to the United States under this contract which shall remain unpaid after the same becomes due there shall be added a penalty of one-half of one percent (½%) per month of such delinquent sum from and after the date when such sum becomes due and payable, and the City agrees to pay such penalty.

Secretary to Determine Disputed Questions of Fact.

20. In the event of disputes between the parties hereto arising out of this contract, involving questions of fact, and in so far as the provisions hereof require a determination of fact to be made, the Secretary is hereby designated as the arbiter of such questions and is the one required to make such determination of facts and his decision thereon shall be conclusive and binding upon the parties hereto.

Successors and Assigns Bound.

21 The provisions of this contract shall apply to and bind the successors and assigns of the respective parties: provided, however, that no transfer by the City of any interest in this contract shall be valid

until the City has received the written consent thereto of the Secretary or his duly authorized representative and the written consent thereto of the District.

Contingent on Appropriations.

22. Where the operations of this contract extend beyond the current fiscal year it is understood that the contract is made contingent upon Congress making the necessary appropriations for expenditures thereunder after such current year has expired. In case such appropriation as may be necessary to carry out this contract is not made, the City hereby releases the United States and the District from all liability due to the failure of Congress to make such appropriation.

Officials not to Benefit.

23. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

In Witness Whereof the parties hereto have signed their names the day and year first above written.

THE UNITED STATES OF AMERICA.

By (S.) L. R. FIOCK,
Supt. Bureau of Reclamation

THE CITY OF EL PASO, TEXAS.

By (S.) J. E. ANDERSON,
Mayor.

Attest:
W. R. COLLINS,
City Clerk.

EL PASO COUNTY WATER
IMPROVEMENT DISTRICT
NO. 1,
By (S.) IDUS T. GILLETT,
President.

Attest:
K. B. IVEY,
Sec'y. El Paso County Water
Improvement District No. 1.

"P-140".

The City of El Paso, Texas

Legal Department
610 Bassett Tower

J. E. Anderson
Mayor

Travis White
City Attorney
Reuben F. Momsen
Assistant

May 22, 1945

El Paso County Water Improvement District No. 1
El Paso National Bank Building
El Paso, Texas

Attention—Mr. Harwell

Dear Mr. Harwell:

The City of El Paso desires to purchase 73.45 acres of land out of Tract 12-A in Block 52, of the Ysleta

Grant, in El Paso County, Texas, the land to be purchased being also known as Tracts 7, 8, and 9, according to replat of said property. For your convenience I enclose plat of the land involved and also the replat showing Tracts 7, 8, and 9.

The City desires to purchase this property under the terms of the contract dated February 18, 1941, between the United States, the City of El Paso, and the El Paso County Water Improvement District No. 1, and I will appreciate it if you will advise me as soon as possible whether the District will approve such purchase.

In connection with this proposed purchase, it is my understanding that the present owner has not used any water during the current water year on Tracts 8 and 9 but does have approximately 15 acres of Tract 7 under cultivation. If this be true, then I assume that the City would be entitled to use the water to which said Tracts 8 and 9 are entitled by diversion of such quantity of water to its Water Treatment Plant. In regard to Tract 7, as a part of same is under cultivation, it appears to me that the tenant should probably be allowed to remain in possession thereof during the current water year.

Very truly yours,

(S.) R. F. MOMSEN,

(R. F. Momsen),

Assistant City Attorney

P

Enclosures

"P-141".

June 12, 1945

Mr. R. F. Momsen
Assistant City Attorney
610 Bassett Tower
El Paso, Texas

Dear Mr. Momsen:

I reply to your letter of May 22nd in which you make known that the City of El Paso desires to purchase 73.45 acres of land described as Tracts 7, 8, 9 out of Tract 12-A in Block 52 of the Ysleta Grant, this purchase to be made under the terms of the contract dated February 18, 1941 between the United States, the City of El Paso, and El Paso County Water Improvement District No. 1.

An inspection of the property discloses that it falls within the character and location of lands the purchase of which this organization is willing to approve under the terms of the cited contract, and approval is accordingly hereby given.

There will be no objection to the continuation of the cultivation of approximately 15.00 acres out of Tract 7 provided that all lands over which water is flowed shall be regarded as acreage from which use of water will not be transferred to the treating plant at El Paso. Agreement in this matter may be reached by consultation with the local superintendent of the United States Bureau of Reclamation.

Very truly yours,

ROLAND HARWELL,
General Manager.

RH—mjb

"P-142".

The City of El Paso, Texas

Legal Department
910 Bassett Tower

J. E. Anderson
Mayor

Theodore Andress
City Attorney
Reuben F. Momsen
Abner S. Lipscomb
Assistants

April 14, 1944

El Paso County Water Improvement District No. 1
El Paso National Bank Building
El Paso, Texas

Attention--Mr Harwell

Gentlemen:

The City of El Paso desires to acquire Tract 12, in Block 10, of the Resurvey of the Socorro Grant, containing 13.26 acres, the proposed purchase by the City to be made under the terms of a contract dated February 18, 1941, between the United States, the City, and your District.

Kindly advise me as soon as possible whether the acquisition of this property will interfere with the operation of the District or materially impair the economic system of any community thereof.

Should the City acquire the above described property it will convey to the present owners thereof Tract 35, in Block 21, of the Socorro Grant, and a portion

of Tract 12, in Block 24, of said Grant, containing 1.13 acres of land.

Very truly yours,
(S.) R. F. MOMSEN,
Assistant City Attorney.

"P-143"

May 15, 1944

Mr. R. F. Momsen
Assistant City Attorney
910 Bassett Tower
El Paso, Texas

Dear Mr. Momsen:

Reference is made to your letter of April 14th indicating the desire of the City of El Paso to acquire Tract 12 in Block 10 of the re-survey of the Socorro Grant containing 13.2[illegible] acres under terms of the contract dated February 18, 1941 between the United States, City of El Paso and this organization. We find that the acquiring of this Tract on the part of the City of El Paso, subject to the contingency hereinafter mentioned, will not interefere with the operation of the District or materially impair the economic situation of any community thereof.

You have indicated your intention of conveying to the present owner of Tract 12 in Block 10, Socorro Grant, two tracts of land; namely Tract 35 in Block 21 and a portion of Tract 12 in Block 24, both of the Socorro Grant. With respect to this exchange the District does seriously object to the conveying of 1.13 acres out of Tract 12 in Block 24 on the ground that said Tract may not be joined to Tract 35 in Block 21

without the requirement of facilities for crossing a separating canal and adding to the problems of maintenance which such disassociation of tracts would bring about. Accordingly, the approval of the acquiring on part of the City of Tract 12 in Block 10 of the Socorro Grant is given contingent upon the elimination from conveyance of the 1.13 acres out of Tract 12 in Block 24, since it is held that an indirect interference with the operation of the District would result.

Very truly yours,
ROLAND HARWELL,
General Manager.

RH—mjb

"P-144"

June 27, 1944

Mr. R. F. Momsen
City Attorney
Bassett Tower
El Paso, Texas.

Dear Mr. Momsen:

You are advised that the objection heretofore made known with reference to the transferring by the city of El Paso to Perez of 1.12 acres of land out of Tract 12 in Block 24 of the Socorro Grant is removed.

Mr. Perez has acquired rightaway for a ditch required to serve the land mentioned and has thus eliminated our objection.

Very truly yours,
ROLAND HARWELL,
General Manager.

cc: Flock

"P-145".

The City of El Paso, Texas

(Seal)

Legal Department
610 Bassett Tower

July 5, 1945

J. E. Anderson
Mayor

Travis White
City Attorney
Reuben F. Momsen
Assistant

El Paso County Water Improvement District No. 1
El Paso National Bank Building
El Paso, Texas

Attention—Mr. Roland Harwell

Dear Mr. Harwell:

The City of El Paso, Texas, owns Tract 27, Block 9, Socorro Grant, containing 3.37 acres of land, and the City desires to use the water from this land in connection with its Water Treatment Plant here in El Paso.

I will appreciate it if you will advise if the purchase and ownership of this land by the City of El Paso and use of the water rights appertaining thereto in connection with its Water Treatment Plant is agreeable to your District under the terms of that certain contract dated February 18, 1941, between the

United States, the City of El Paso, and the El Paso County Water Improvement District No. 1.

Very truly yours,
(S.) R. F. MOMSEN,
(R. F. Momsen),
Assistant City Attorney.

"P-146".

July 6, 1945.

Mr. R. F. Momsen
Assistant City Attorney
610 Bassett Tower
El Paso, Texas

Dear Mr. Momsen:

In reply to your letter of July 5th, you are hereby advised that the delivery of water under contract dated February 18, 1941 between the United States, the City of El Paso and El Paso County Water Improvement District No. 1 is approved with reference to lands in the ownership of the City of El Paso described as Tract 27 in Block 9 of the Socorro Grant containing 3.37 acres of land.

Very truly yours,
ROLAND HARWELL,
General Manager.

cc—Mr. L. R. Fiock
Project Superintendent.

"P-147".

The City of El Paso, Texas
(Seal)
Legal Department

610 Bassett Tower

July 10, 1945

J. E. Anderson
Mayor

Travis White
City Attorney
Reuben F. Momsen
Assistant

El Paso County Water Improvement District No. 1
El Paso National Bank Building
El Paso, Texas

Attention—Mr. Harwell.

Dear Mr. Harwell:

The White Gin Association has advised the City of El Paso that it is the owner of approximately 7 acres of land in the Upper Valley, located in El Paso County, and that it would be willing to enter into a contract to sell said land to the City so that the City could acquire water rights in connection with its Water Treatment Plant.

The City of El Paso is now the owner of Tract 2-A, Block 5, of the El Paso County Re-Survey of the San Elizario Grant, some twenty acres of which have been carried as suspended land.

The City would like to know if your District will approve its acquisition of the property owned by the

White Gin Association for the use of the water rights appurtenant thereto in connection with its Water Treatment Plant and whether the water rights now appurtenant to such land belonging to the White Gin Association could subsequently be assigned and transferred to the land in Tract 2-A, Block 5, of the El Paso County Re-Survey of the San Elizario Grant.

Sincerely yours,
(S.) R. F. MOMSEN.
(R. F. MOMSEN),
Assistant City Attorney.

"P-148".

The City of ~~El~~ Paso, Texas

(Seal)

Legal Department
610 Bassett Tower

August 17, 1945

J. E. Anderson
Mayor

Travis White
City Attorney
Reuben F. Momsen
Assistant

El Paso County Water Improvement District No. 1
El Paso National Bank Building
El Paso, Texas

Attention—Mr. Harwell.

Gentlemen:

The City of El Paso has been furnished with a list of property which it understand has been foreclosed

for taxes and water charges, said property consisting of the following:

Tract 7, Block 21, San Elizario Grant, 2.75 Acres.
Tract 10, Block 21, San Elizario Grant, 20.54 Acres.
Tract 12, Block 21, San Elizario Grant, 5.86 Acres.
Tract 15, Block 27, San Elizario Grant, 6.78 Acres.
Tract 2-F, Block A, Socorro Grant, 31.46 Acres.
Tract 8, Block 21, Socorro Grant, 4.24 Acres.
Tract 9-A, Block 28, Socorro Grant, 6.83 Acres.
Tract 5-B, Block 41, Ysleta Grant, .84 Acres.
Tract 12-B, Block 52, Ysleta Grant, 1184 Acres.
Tract 21, Block 52, Ysleta Grant, 7.63 Acres.

It is possible that the City of El Paso would like to purchase all of these tracts for the purpose of acquiring the water rights in connection with its Water Treatment Plant project, and, if such purchases would be agreeable to you, will you kindly so advise the City in writing, as provided by Section 9-f of that certain contract dated December 1, 1944.

Very truly yours,
(S). REUBEN F. MOMSEN,
(Reuben F. Momsen)
Assistant City Attorney.

The Court:
Do these exhibits that you have been introducing this morning account for substantially all of the some 1650 acres that the City acquired?

Mr. Edwards:
I haven't added up all of the acreage, Your Honor, but those were the letters and correspondence which Mr. Phillips was able to find in the records of the El Paso County Water Improvement District Number

One and, of course, are offered for the purpose of showing that there was a full, complete and knowing ratification and adoption and compliance of each contract by the City of El Paso, and that over the course of several years there they were endeavoring to live up to the requirements made in those contracts of securing the approval of the District before they bought any land. I haven't added up the total acreage. There was one letter, I believe it is dated November 10, 1943, which said that up to that time the City had acquired about 1137 acres, I think, with the list attached showing what that acreage was; and then after that there were other letters where they stated that they wished to buy more land.

The Court:
All right.

Questions by Mr. Edwards (Cont'd):

Q. Now, Mr. Phillips, I will ask you to examine these statements which are marked "Plaintiffs' Exhibits 148a, 148b, 148c, 148d and 148e" (Reporter marks same), and ask you what they are.

A. Exhibits 148a, 148b, 148c and 148d are statements of delinquent accounts of the City of El Paso as reflected on the books of El Paso County Water Improvement District Number One for charges made under the contracted dated August 10, 1949, with interest through November, 1954, for the years 1951, '52, '53 and '54, respectively. Exhibit 148e is an excess water bill delinquent and unpaid by the City as reflected on the books of El Paso County Water Improvement District Number One, with interest figured through November, 1954, for the year 1953.

Q. Will you state the amounts of each one of those?

A. The total amount?

Q. Yes?

A. For the year 1951, $2798.61—

Mr. Grambling:

Will you identify those exhibits as you go along?

A. Exhibit No. 148a for the year 1951: $2798.61. Exhibit 148b for the year 1952: $4877.60. Exhibit No. 148c for the year 1953: $3659.01. Exhibit No. 148d for the year 1954: $5108.31. Exhibit No. 148e, an excess water bill for the year 1953: $383.04.

Q. And that is the total of $16,826.57, I believe, according to the adding machine figure that you gave me, is that right?

A. Yes, sir. That is correct.

Q. Mr. Phillips, were these statements made up from the records of your office and do they cover the same items which the City had previously paid pursuant to these contracts up until the time they went delinquent as shown by these statements?

A. Well, up until the year, for the year 1951, the City had paid, before they became delinquent, similar charges as those reflected by these statements.

(The exhibits were then shown to opposing counsel)

Mr. Grambing:

No objection.

Plaintiffs' Exhibit No. 148a, having been received in evidence by the Court, reads in words and figures as follows:

(See next page:)

"P-148a".

Statement Water Charges For 1951

El Paso County Water Improvement District No. 1
705 El Paso Nat'l. Bldg., El Paso, Texas.

Date Nov. 1, 1951.

City of El Paso,
El Paso, Texas.

	Acre Feet	Rate	Amount
Water diverted by City of El Paso through Project facilities under contract dated August 10, 1949	2205.20	$1.00	$2205.20
Water diverted by City of El Paso through Project facilities from wells in Canutillo area less transportation losses	166.50	$1.00	166.50

Amount

Due November 1, 1951	$2371.70
Interest on Delinquent Acct.	$ 426.91
Total	$2798.61

Plaintiffs' Exhibit 148b, having been received in evidence by the Court, reads in words and figures as follows:

"P-148b".

Statement Water Charges For 1952

El Paso County Water Improvement District No. 1
705 El Paso Nat'l Bldg., El Paso, Texas.

Date Oct. 6, 1952.

City of El Paso,
El Paso, Texas.

	Acre Feet	Rate	Amount
Water diverted by City of El Paso through Project facilities under contract dated August 10, 1949	2295.90	$1.00	$2295.90
Water diverted by City of El Paso through Prcject facilities from wells in Canutillo area less transportation losses	2059.10	$1.00	$2059.10

Amount	
Due November 1, 1952	$4355.00
Interest on Delinquent Acct.	$ 522.60
Total	$4877.60

Plaintiffs' Exhibit 148c, having been received in evidence by the Court, reads in words and figures as follows:

"P-148c".

Statement Water Charges For 1953

El Paso County Water Improvement District No. 1
705 El Paso Nat'l Bldg., El Paso, Texas.

Date Oct. 14, 1953.

City of El Paso,
El Paso, Texas.

	Acre Feet	Rate	Amount
Water diverted by City of El Paso through Project facilities under contract dated August 10, 1949	1117.00	$1.00	$1117.00
Water diverted by City of El Paso through Project facilities from wells in Canutillo area less transportation losses	2334.90	$1.00	$2334.90

Amount	
Due November 1, 1953	$3451.90
Interest on Delinquent Acct.	207.11
Total	$3659.01

Plaintiffs' Exhibit 148d, having been received in evidence by the Court, reads in words and figures as follows:

"P-148d".

Statement Water Charges For 1954

El Paso County Water Improvement District No. 1
705 El Paso Nat'l. Bldg., El Paso, Texas.

Date Oct. 10, 1954.

City of El Paso,
El Paso, Texas.

	Acre Feet	Rate	Amount
Water diverted by City of El Paso through Project facilities under contract dated August 10, 1949	445.80	$1.00	$ 445.80
Water diverted by City of El Paso through Project facilities from wells in Canutillo area less transportation losses	4637.10	$1.00	$4637.10

Amount

Due November 1, 1954	$5082.90
Interest on Delinquent Acct.	25.41
Total	$5108.31

Note

Page 992 is on Card 16

(At this point an exhibit consisting of 45 separate sets of bills, were marked for identification as "Plaintiffs' Exhibit 148f")

Q. Mr. Phillips, I ask you to examine Plaintiffs' Exhibit Number 148f and ask you to state what that is.

A. All of the separate items contained in this bound group identified as Exhibit Number 148f are the assessment charges for water service for the year 1954 as placed on the tax roll in the El Paso County Water Improvement District Number One for the year 1954 in the name of the City of El Paso to cover operation and maintenance charges and reservoir service charges on water-right lands owned by the City of El Paso under the contracts of 1941 and 1944.

Q. And are these charges the same charges that are made to all other owners of water-right land within the District?

A. They are, yes, sir.

Q. I notice that you have them all made up in triplicate, or something, here. Is there any particular reason for that, or shall we just let it go as one exhibit?

A. The reason they are made up that way is that under the law we have to make up our bills, our statements, in such a way that we have to mail a notice first and then a notice of the bill, and then have a receipt for the customer and a receipt for the records of the District.

Q. The reason I am inquiring, do you want to retain any part of this exhibit?

A. No. Those are copies.

Q. There are several copies for each bill?

A. Yes. Those are copies.

Q. Have those statements been mailed to the City?

A. Yes, sir.

Q. And is the total of this exhibit, 148f, $9,413.47?

A. Yes, sir.

Q. Making a total of all of the exhibits you have offered here as to the City's indebtedness, $26,240.04, is that correct?

A. Yes, sir.

Mr. Edwards:

We offer Exhibit Number 148f in evidence.

(Same was shown to opposing counsel.)

Mr. Grambling:

No objection.

(Plaintiffs' Exhibit Number 148f, consisting of forty-five sheets, was thereupon received in evidence by the Court, and photostatic copies of this exhibit appear on the pages following.)

Note

Pages 995-1001 are on Card 17;
Pages 1002-1009 are on Card 18;
Pages 1010-1015 are on Card 19.

1016

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 10931

City of El Paso

PAGE 36

COPY

LINE 15

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No	SUBDIVISION Lot	Blk	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir service Charge Rate .20	TOTAL TAX
									$
24	10A								
Soc.					13.37		33.56	2.67	36.23
							TOTAL		$.

1017

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. ~~1000~~ 8826

PAGE 36

City of El Paso

COPY

LINE 16

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION				Taxable Acres	TAX			
File No.	Item No.	SUBDIVISION Lot	Blk	Name		Repayment Construction Rate 1/28	Maintenance & Operation Rate 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
					1.13		7.06	.23	$ 7.29
								TOTAL	$

1018

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 10933

City of El Paso

PAGE 36

CITY 1

LINE 17

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
24	11								
Soc.					10.86		67.88	2.17	70.05
							TOTAL		$

1019

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

8828

No. [redacted]

PAGE 36

City of El Paso

COPY

LINE 18

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
24 Soc.	12A				2.22		13.88	.44	14.32
							TOTAL		$

1020

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 8829

City of El Paso

PAGE 36

COPY

LINE 19

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk No.	Tract No.	SUBDIVISION Lot	Blk	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
24	128				47.44		296.50	9.49	305.99
Sec.									
								TOTAL	$

1021

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1 8832

705 El Paso National Bank Bldg., El Paso, Texas

No. [redacted]

The City of El Paso

PAGE 36

COPY

LINE 20

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	SUBDIVISION Blk.	SUBDIVISION Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
24 Soc	15				14.00		87.50	2.80	90.30
								TOTAL	

1022

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. ~~10087~~ 8833

~~Tax~~
The City of El Paso

COPY

PAGE 36

LINE 21

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
24 Soc.	16				20.04		125.25	4.01	$ 129.26
							TOTAL		$

1023

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

8861

No. [redacted]

City of El Paso

PAGE 36

COPY

LINE 22

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
27 Soc.	30				3.45		21.56	.69	$ 22.25
							TOTAL		$

1024

"P-145f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 8926

City of El Paso

PAGE 36

COPY

LINE 23

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	SUBDIVISION Blk.	SUBDIVISION Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
									$
5	2A								
S.E.					6.47		40.44	1.29	41.73
								TOTAL	$

1025

"P-14-f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9021

City of El Paso

PAGE 36

COPY

LINE 24

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
12	4A								
S.E.					22.96		143.50	4.59	148.09
								TOTAL	$

1026

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. [redacted]

PAGE 36

City of El Paso

CITY

LINE 25

Descriptions used are from the Official Maps of the County of El P

PROPERTY DESCRIPTION						TAX			
Blk No.	Tract No	SUBDIVISION Lot	Blk	Name	Taxable Acres	Improvement Construction Rate Line	Maintenance & Operation Rate $ 6.25		TOTAL TAX
13	4								
S.D.					8.02		50.19		

1027

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9261

City of El Paso

PAGE 36

COPY

LINE 27

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
									$
21 S.E.	7				2.88		18.00	.58	18.58
							TOTAL		$

1028

"P-146f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9627

The City of El Paso

PAGE 36

COPY

LINE 28

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION			Taxable Acres	Repayment Construction	Maintenance & Operation	Reservoir Service Charge	TOTAL TAX
		Lot	Blk.	Name		Rate 1/28	Rate $ 6.25	Rate .20	
34 S.E.	6				7.84		49.00	1.57	$ 50.57
							TOTAL		$

1029

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9643

The City of El Paso

PAGE 36

COPY

LINE 29

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
									$
36 S.E.	6				18.69		116.81	3.74	120.55
							TOTAL		$

1030

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9865

The City of El Paso

PAGE 36

COPY

LINE 30

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION			Taxable Acres	Repayment Construction	Maintenance & Operation	Reservoir Service Charge	TOTAL TAX
		Lot	Blk.	Name		Rate 1/28	Rate $ 6.25	Rate 20	
57	6P								$
S.E.					6.82		42.63	1.36	43.99
							TOTAL		$

1031

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9881

The City of El Paso

PAGE 36

COPY

LINE 31

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
									$
59 S.E.	98				30.00		187.50	6.00	193.50
							TOTAL		$

1032

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

706 El Paso National Bank Bldg., El Paso, Texas

No. 9869

The City of El Paso

PAGE 36

COPY

LINE 32

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION			Taxable Acres	Repayment Construction	Maintenance & Operation	Reservoir Service Charge	TOTAL TAX
		Lot	Blk.	Name		Rate 1/28	Rate $ 6.25	Rate 20	
									$.
60	3A								
S.E.					98.60		616.25	19.72	635.97
							TOTAL		$

1033

"P-146f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9892 [redacted]

The City of El Paso

PAGE 36

COPY

LINE 33

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION			Taxable Acres	Repayment Construction	Maintenance & Operation	Reservoir Service Charge	TOTAL TAX
		Lot	Blk.	Name		Rate 1/28	Rate $ 6.25	Rate 20	
									$
60	4B								
S.E.					88.45		552.81	17.69	570.50
							TOTAL		$

"P-1481" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9894

The City of El Paso

PAGE 36

COPY

LINE 34

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
60 S. E.	6P				95.97		599.81	19.19	$ 619.00
							TOTAL		$

1035

"P-14.6f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9913

The City of El Paso

PAGE 36

COPY

LINE 35

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
									$
62 S.S. 8	5B				80.00		500.00	16.00	516.00
							TOTAL		$

1036

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9961

City of El Paso

PAGE 36

COPY

LINE 36

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
6 L.V.	4B				116.60		728.75	23.32	752.07
							TOTAL		$

1037

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9967 [redacted]

The City of El Paso

PAGE 36

COPY

LINE 37

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX $
8	2	1-32	5						
[redacted]		1-32	6						
		7-32	7	Alamo					
		1-32	10	Alto	15.80		98.75	3.16	101.91
		1-32	11						
		1-32	12						
L.V.									
							TOTAL		$

1038

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9997

PAGE 36

City of El Paso
% Water Department
El Paso, Texas

COPY

LINE 38

Descriptions used are from the Official Maps of the County of El Paso

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $ 6.25	Reservoir Service Charge Rate 20	TOTAL TAX
									$
9	2								
L.V.					166.51		1040.69	33.30	1073.99
								TOTAL	$

1039

"P-148f" (Cont'd)

INVENTORY OF TAXABLE PROPERTY

1954

El Paso County Water Improvement District No. 1

705 El Paso National Bank Bldg., El Paso, Texas

No. 9998

City of El Paso
% Water Department
El Paso, Texas

COPY

PAGE 36

LINE 39

Descriptions used are from the Official Maps of the County of El Paso.

PROPERTY DESCRIPTION						TAX			
Blk. No.	Tract No.	SUBDIVISION Lot	Blk.	Name	Taxable Acres	Repayment Construction Rate 1/28	Maintenance & Operation Rate $6.25	Reservoir Service Charge Rate .20	TOTAL TAX
									$
9 L.V.	3				117.02		731.38	23.40	754.78
							TOTAL		$

Mr. Edwards:

You may take the witness.

On Cross Examination.

Questions by Mr. Grambling:

Q. Mr. Phillips, you of course are familiar with the facilities down there near the City water treatment plant, are not, the location of them?

A. I have been there I think twice, Mr. Grambling.

Q. Have you ever been to the American Dam up here? (Indicating.)

A. Yes, sir.

Q. Are you familiar where it is located?

A. Yes, sir.

Q. Have you been there twice too?

A. Yes, sir.

Q. And you are familiar with the American Canal?

A. I know about where it is, yes, sir.

Q. Well, that is all within your jurisdiction, isn't it, all that area?

A. What do you mean by "jurisdiction", Mr. Grambling?

Q. Well, I mean it is within the area from the beginning of the Elephant Butte Project and the end of the Elephant Butte Project Number One, isn't it, or is it?

A. I would say that it is within the area that serves the El Paso County Water Improvement District Number One.

Q. Well, that is what I meant.

A. Yes, sir.

Q. And then would you say that that is (indicating on blackboard)—of course, this isn't drawn to scale, you know that. I know you observed this while you

were sitting over there. Would you say it reasonably portrays with reasonable accuracy the facilities as therein delineated?

A. As I know them, I would say that it does.

Q. This first stream would be the river, is that right, what is known as the Rio Grande?

A. Yes, sir. I think that is what it is meant to depict, yes, sir. The Rio Grande.

Q. And this second stream would be what is known as the American Canal, down to this sand trap?

A. I think that is what it is meant to be.

Q. Now, there is a sand trap at the head of the Franklin Canal, is there not?

A. That I can't say. I don't know.

Q. Then this would represent the Franklin Canal (indicating), this last stream, would it not?

A. Yes, sir.

Q. Then would that be the approximate location of the American Dam? (Indicating.)

A. Well, for all practical purposes on that chart, I would say that it would be.

Q. And would this be the approximate location of the International Dam? (Indicating.)

A. Without going into scale, I would say that that could be identified as the location of the International Dam.

Q. And would this be the approximate location of the City's water treatment plant?

A. Yes, sir.

Q. Now, they have intakes there where they take water both from the Franklin Canal and from the river, do they not?

A. I believe they do, yes, sir.

Q. How far is the distance from the head of the Franklin Canal down to the intake where the City of El Paso takes water out of the Franklin Canal?

A. I don't know.

Q. Could you give us an estimate?

The Court:

Couldn't we stipulate that distance, gentlemen? Don't you know what it is?

Mr. Resch:

Approximately a mile and a half.

A. I was going to say about a mile or a mile and a half.

Q. About a mile and a half from the head of the Franklin Canal down to where the intake is, is that right?

A. Yes, sir.

Q. Now, the Santa Fe Bridge would be here down below?

A. Yes, sir.

Q. The American Dam is all in Texas, I believe, isn't that right?

A. I believe it is.

Q. I got that a little too high up—

The Court:

No. Wait a minute. You mean that one end of the dam is in Old Mexico?

A. I want to correct my answer to that. I don't think that the American Dam is all in Texas.

Q. Sir?

A. I want to correct my answer to that. As I said in the beginning, I am not particularly qualified, but I don't think that the American Dam is all in Texas. I think it is all in the United States.

Q. It is either in Texas or New Mexico?

A. It is all in the United States.

Q. They sometimes refer to it as the All-American Dam, don't they?

A. Yes, sir.

Q. Now, Mr. Phillips, the first statement that you put in evidence here, Exhibit 148a, shows a statement of delinquent account for the City of El Paso for 1951, I believe?

A. Yes. I put them in so that the first exhibit referred to 1951.

Q. And that is $2,798.61?

A. Yes, sir.

Q. Would you tell us how you reached that figure, what that account consists of?

A. That figure is arrived at by multiplying the number of acre feet of water which was diverted through Project facilities to the water treatment plant in accordance with Sub-Section 1 of Article 7 of the contract of August 10, 1949 between the City of El Paso and the El Paso County Water Improvement District Number One.

Q. Well, now, I am going to try to make this brief because I think we all know what we are talking about without going into historical review each time we answer a question. As I understand, this item of $2798.61 didn't apply to water which El Paso had used by virtue of any water-rights which it had on lands located in the Project, is that right?

A. That is right.

Q. But what it did apply to was water that it took either out of the river or out of the Franklin Canal during that year and put into its treatment plant, is that right?

A. No, sir.

Q. Well, what did it consist of?

A. It applied only to water that was taken out of the Franklin Canal.

Q. Did you keep a separate list of what came out of the Franklin Canal and what came out of the river?

A. I didn't, but it was furnished to me by the Bureau of Reclamation.

Q. You haven't put that in evidence?

A. It is reflected in the bill as the amount of water which the City diverted under the contract.

Q. Well, then, there is no part of the water diverted from the river charged against the City, am I right, in that statement?

A. From that particular point in the river.

Q. Well, was it from some other point?

A. Well, the water that arrived in the Franklin Canal of necessity came from the Rio Grande above the water treatment plant.

Q. Now, I believe the testimony shows there's about a mile and a half from the head of the Franklin Canal down to where this water was taken out?

A. Yes, sir.

Q. Now, that water originally came from the American Canal, did it not?

A. Yes, sir.

Q. That same water came through the American Canal?

A. Yes, sir.

Q. And came down the Rio Grande River from the foot of the outlet at Caballo Dam, didn't it?

A. Yes, sir.

Q. And what you have done is you have charged the City of El Paso the same amount for transport-

ing that water a mile and a half that you have charged other people in the Project for transporting it from Caballo Dam down to El Paso, have you not, or down to their land?

A. I charged the City of El Paso strictly in accordance with the terms of the contract of August 10, 1949.

Q. Are you a lawyer?

A. No, sir.

Q. How do you know that you have done it in accordance with the terms of the contract? Are you able to construe a contract?

A. Well, I feel that I have intelligence to read the contract. When I am furnished the figures that apply to that contract I am able to multiply by the rate.

Q. Did you know what all these groups of lawyers are sitting here about, trying to construe those contracts? At any rate, you did charge them, the City of El Paso, for transporting the water from the head of the Franklin Canal down to the City's water treatment plant the figure that you have shown there, $2798.61?

A. Well, I think the water was transported farther than that.

Q. Do you claim to have any authority for charging for water transported in the American Canal?

A. Well, the water, before it gets to the American Canal, is run through Project facilities.

Q. Well, let's take one question at a time, then we will get to that. Do you claim to have any rights to charge for water transported through the American Canal?

A. If it is Project water I believe we do.

Q. Even though they are not your facilities?

A. Yes, sir.

Q. And the District didn't contribute a dime towards the construction of the American Canal, did they?

A. No, sir.

Q. And then your charges, Mr. Phillips, if I may assume correctly, your charges for the other years, set out there in these exhibits, aggregating a total of $16,826.00, are assessed for the same type of water and on the same basis and for the same reason, is that correct?

A. Yes, sir.

Q. And after the Canutillo wells were drilled and the City started pumping that water, any water that came through the Franklin Canal from those Canutillo wells, did you charge for that?

A. Yes, sir.

Q. You charged for that also?

A. Yes, sir.

Q. Same price?

A. Yes, sir.

Q. Now, it isn't your contention that that water came from up here, from the Caballo Dam, is it?

A. No, sir. It came from the wells in the Canutillo area.

Q. Which are about fifteen miles, located about fifteen miles from this plant, are they not?

A. Approximately, yes, sir.

Q. And that water, of course, came down this American Canal, didn't it?

A. Yes, sir.

Q. And it came down the rectified Rio Grande River?

A. Yes, sir.

Q. Did you have anything to do with rectifying the river—by "you" I mean the District—did the District pay a dime towards rectifying that river?

A. No, sir.

Q. Did they pay a dime towards the cost of rectifying the river from Caballo Dam clear down to this water treatment plant?

A. No, sir.

Q. Then it is your position that you got a right to charge for those facilities although you didn't install them and although you didn't put out a dime on them?

A. Well, it is our position, I am speaking strictly now as a District officer, that we are entitled to charge under the terms of the contract which we recognize.

Q. And you did charge them, in any event, for facilities which you didn't put in and which didn't cost you a dime, didn't you?

A. Well, I'd say the water went through facilities that didn't cost us anything.

Q. Didn't cost you what?

A. Didn't cost us anything.

Q. Didn't cost you anything?

A. No, sir.

Q. Now, what is this item of $9,413.47, that Exhibit 148f, assessment charges for the City of El Paso. Where does that differ? That's that big pamphlet we had there?

A. Well, these are the regular operation and maintenance and reservoir service charges which are made annually against all tracts of water-right lands within the El Paso County Water Improvement District Number One to the ownership of those lands, and each tract is assessed separately for those charges, and as you probably know, the City of El Paso is the owner of some 1491 acres in our District which is composed of a good many individual tracts, and these statements cover each one of these individual tracts.

Q. Well, as I understand, that is just simply the regular charges on water-right land?

A. That is right.

Q. And has nothing whatever to do with this water which the City diverted either from the Franklin Canal or from the Rio Grande?

A. Only to this degree, that upon the payment of these charges under the contracts of 1941 and 1944 whereby the City acquired water-right lands, instead of the water being delivered to these lands, as you know, the water is delivered to the treatment plant.

Q. Well, yes, I know that, but these items you have here aggregating sixteen thousand eight hundred and sixteen dollars, they are in addition, that is additional water?

A. It has nothing to do with this other.

Q. There is no duplication of charges is what I mean?

A. No, sir.

Q. The only difference between the charges there and the charges on water-right land is the point of delivery; on water-right land ordinarily you deliver it at the land?

A. That is right.

Q. But here the City acquired the rights and you delivered the water at their water treatment plant?

A. That is right.

(At this point a recess was had from 10:30 a.m. until 10:40 a.m. the same day, at which time proceedings were resumed as follows):

Q. Mr. Phillips, I was asking you about these charges that you say the City owes in the amount of $26,816.04. Are those charges delinquent, is that what you mean?

A. The charges under the terms of the contract of August 10, 1949, which aggregate in round figures about sixteen thousand dollars, are delinquent.

Q. How about the $9,413.00?

A. No, sir. That does not become delinquent until February 1, 1955, and the City has always paid those charges on time.

Q. Then you didn't intend to lead the Court to believe—did I understand you to say that those in that large group are delinquent? They state right there that they are not delinquent until January 31, 1955, do they not?

A. I don't think that I testified that that particular group was delinquent.

Q. Well, they do state right there in red ink that they are not delinquent until January 31, 1955?

A. That is right.

Q. And the City has at all times paid those water charges and assessments on this land which it holds water rights upon, hasn't it?

A. That is true.

Q. What was your purpose in putting that into the case, the $9,413.00?

Mr. Edwards:

I will answer that. To show what it owes as of November 1, 1954.

Mr. Sims:

You are not suing for that.

Mr. Edwards:

Yes. I think that is included in the complaint as to what the City owed at the time the complaint was filed and what they owed at the time the case was

tried. In other words, we didn't want to get into a situation where they would come in later and say you should have collected that.

Mr. Sims:
It isn't due until February 1st.

Mr. Edwards:
It is due now.

Mr. Sims:
I mean delinquent.

Mr. Edwards:
Well, now, that is a different thing.

(By Mr. Grambling—cont'd):

Q. Mr. Phillips, are you familiar with the sale of power rights up there at Elephant Butte Dam where the District received considerable money?

A. I am not familiar with where the District received any money for the sale.

Q. Well, they got a credit on what they owed the Government, did they not?

A. Yes, sir.

Q. How much credit did they get?

A. Under the terms of the contracts between the two districts, of November 9th in the upper district and November 10, 1937 of the El Paso County Water Improvement District Number One, the reimburseable cost of Elephant Butte Dam as provided for in the original contracts was charged into power and the District was relieved of that amount of liability.

Q. Will you give us the amount?

A. It was in the neighborhood of four million dollars.

Q. It was four million four hundred and forty-six dollars, to be exact, wasn't it?

A. Well, I couldn't give you an exact figure without reference to the books. It was in excess of four million dollars.

Q. Now, did the District ever get any permit from the State Board of Water Engineers for the use of water for hydroelectric purposes up there?

A. You are talking about the El Paso County Water Improvement District Number One?

Q. Yes, sir?

A. Not as far as I know.

Q. As far as you know did the Elephant Butte District ever get any?

A. Get authority from whom?

Q. From the State of Texas?

A. Why would it be required to get authority from the State of Texas?

Q. I understood you that that water had been coming into Texas?

A. I haven't testified yet, Mr. Grambling, that water from New Mexico has come down into Texas, except to trace it from Caballo Dam on down.

Q. You don't think any water that came out of Elephant Butte came into Texas?

A. Oh, yes.

Q. Now, you are talking about the contract, referred to contracts the City has. You also have a contract, do you not, with the El Paso Electric Company with reference to water they take out up there at their power plant?

A. Yes, sir. There was a contract entered into a good many years ago.

Q. Do you collect for that water that they use?

A. No, sir.

Q. The District doesn't collect for that?

A. No, sir.

Q. Who is that paid to?

A. I think at the time that the contract was entered into between the two districts, at which time I was in the New Mexico District, there was a flat sum paid for the privileges of using that water for cooling purposes for a period of fifty years, and I don't remember what the amount was.

Q. You have no idea now?

A. Well, I have an idea but I don't know how close it would be.

Q. Well, would you refer to your records so we can find out during the day and get it into the record?

A. Yes.

Q. Now, you made a special rate to the Electric Company, at any rate, didn't you? You didn't charge them on the basis of what these farmers are charged?

A. No, that was a flat rate.

Q. A flat rate and a special rate too, wasn't it?

A. I believe it was, yes, sir.

Q. And you are going to let us have the amount of it?

A. Yes, sir.

Q. Now, you were here when Mr. Resch testified yesterday?

A. Yes, sir.

Q. And he stated that they had a right to take from seventy to seventy-five thousand acre feet of water that came down the Montoya Drain, you heard him testify to that, under the terms of this contract, and also had the right to take additional water out of the river?

A. I will go with you that they have the right to take water out of the Montoya Drain and out of the river for cooling purposes for their generators, but I can't tell you exactly what Mr. Resch testified to as to the amount.

Q. Well, now, sir, did you hear the amount mentioned of fifty thousand acre feet being the approximate amount of water that the Electric Company was using for cooling purposes, or in connection with their current, or whatever you want to call it?

A. I believe that is the figure that Mr. Resch testified to.

Q. Well, now, you are familiar with the amount of water the City has been taking out of this river, aren't you, through its plant here (indicating), in addition to the water which you say they have water rights on approximately 1400 acres?

A. Yes, sir.

Q. You are familiar with the amount they have been taking out?

A. Yes, sir.

Q. And you are also familiar with the amount of water effluent they have been putting in down here where the sewage plaint is located on the east side of the City?

A. Yes, sir. I know there has been effluent turned into the river.

Q. And you know that the amount of effluent they put in is in excess every year of the amount of water they take out, don't you?

A. I won't testify to that. I don't know it to be the facts.

Q. You haven't been interested to make that investigation?

A. No, sir. I have not.

Q. Well, now, where is the difference between the El Paso Electric Company taking water out of the river and putting it back into the river and the City of El Paso taking water out here at the treatment plant and putting it in four miles further down below at the sewage plant?

A. Well, of course, the difference as I see it, is this: That the El Paso Electric Company, by agreement and for which they paid, were granted the right to use water for cooling purposes at their plant, and I am given to understand—I think Mr. Resch stated in his testimony—that the consumption of water was infinitesimal.

Q. Now, that is just what I want you to do; use that expression, because I want you to explain to the Court why the use of fifty thousand acre feet of water is an infinitesimal consumption of water. Now, let's have that.

A. Well, I don't think that Mr. Resch testified, and certainly I don't know what the consumptive use is in using water for cooling generators, but I have been given to understand on very good authority that there is practically no consumptive use.

Q. Now, so that I may understand, and I asked Mr. Resch to explain it yesterday, what you mean by consumptive use is that the volume of water which is taken out of the water is diminished very slightly—I mean, out of the river—is diminished very slightly when it is put back into the river? Is that what you mean? They get practically the same water into the river as they take out of the river? Is that what you mean?

A. In the case of the El Paso Electric Company?

Q. And in the case of your definition?

A. Yes, I think that in the case of the Electric Company's consumptive use of water for the use for

cooling purposes, that the actual consumption is very small.

Q. All right. What would you say would be the consumptive use of water by the City of El Paso if it was taking out eight thousand acre feet per year and putting back into the river at the sewage disposal plant thirteen thousand acre feet, would the consumptive use be a minus or a plus?

A. Well, in that event it would probably be a plus.

Q. Then you are getting credit for about five thousand acre feet of effluent there in addition to the water that the City is taking out, aren't you?

A. With that method of calculation.

Q. Well, what method of calculation do you have to use, you got another method?

A. No.

Q. Then it is a good method, isn't it? Now, this effluent, you heard the Court ask Mr. Resch last night before he left the stand what happened to this effluent. Is it true that it is diverted by the Riverside gate there for use to irrigate 29,000 acres of land?

A. I don't know.

Q. You don't know what happens to it?

A. No, sir.

Q. Can it be diverted there?

A. If it got to the Riverside heading it could be diverted, yes, sir.

Q. Now, is it or is it not a fact that the water that is released from the Caballo Dam takes into consideration the thirteen million acre feet of effluent that is put back into the river down there at the City's sewage plant?

A. You mean it is taken into consideration by the Bureau of Reclamation in calculating the—

Q. —the requirements of the farmers. That is exactly what I mean.

A. I believe that Mr. Resch does take that into consideration.

Q. Well, you know it is a fact, don't you?

A. Yes, I think so.

Q. And, as a matter of fact, you were up with the Elephant Butte Irrigation Project, you have been down here since 1925, you know as a matter of fact, that the District and those who are interested in water from the District, in addition to getting an excessive volume of water, get another advantage in that they get the water transported four miles closer to the point where it is to be used, don't they? In other words, the City takes it out at a point four miles above the point where they put it back into the river, isn't that right?

A. Well, there is only one difference in opinion there, Mr. Grambling, and that is that before the City takes it out it has come quite a distance.

Q. Well, I know that. I want to ask you about that. Isn't it a fact that every gallon of water that you transport from the foot of the Caballo Dam or the Caballo Lake loses about one-third of its volume by the time it gets down here to where it is put to use?

A. Mr. Grambling, I can't answer that question because when the same question was asked of Mr. Resch yesterday—who is the man that operates the project and not me—I don't think he answered the question. Certainly I can't.

Q. Would you agree with Mr. Resch's statement that a substantial amount of lossage results from seepage, from evaporation, and from transpiration?

A. Yes, sir.

Q. You would agree with that?

A. I would agree with Mr. Resch's statement to that effect.

Q. Now, you referred to this 1949 contract, Mr. Phillips, where the City was to get water in excess of the requirements of the El Paso County Water Improvement District Number One and the Hudspeth Reclamation District, where would this water go if the City did not take it what use would it be put to?

A. You mean water—

Q. This excess water you were talking about? You remember the Court last night asked substantially that same question of Mr. Resch. What is your theory as to where this water would go, this excess water that wasn't used by either one of these districts?

A. Well, it stands to reason that if there was water in the river at El Paso in excess of the requirements of the El Paso County Water Improvement District Number One and the Hudspeth District it would go on down the river.

Q. Go on down the river?

A. Sure.

Q. Now, after the charges have been paid off—I believe the testimony shows in this case that at the present rate the charges are to be paid off as of 1968?

A. September 1, 1968.

Q. Now, after the charges have been paid off, is it your position that you will have the same powers and rights over the Rio Grande River and water as you now claim?

Mr. Edwards:

I think that obviously calls for a conclusion of law which this witness is not qualified to answer.

The Court:

I sustain the objection.

Mr. Grambling:
What is the ruling, Your Honor?

The Court:
I sustain the objection.

Q. Mr. Phillips, could you tell us the approximate cost of the construction of the Franklin Canal from its head down here to the water treatment plant?
A. No, sir.
Q. You couldn't give us that information?
A. No, sir.
Q. It is a very small part, in any event, of the total cost of the Project, isn't it?
A. That is obvious.
Q. Now, you heard Mr. Friedkin testify yesterday about this flood control that had been established there and this canalization. Of course, the District had nothing to do with the cost of that, did it?
A. No, sir.
Q. Nothing to do with the cost of the American Canal?
A. Nothing to do with paying for it.
Q. Or building it?
A. No, sir.
Q. And nothing to do with paying for or building the American Dam?
A. No, sir.
Q. That was built by the United States Government, wasn't it?
A. Yes, sir.
Q. How many employees does the El Paso County Water Improvement District Number One have?
A. Four.
Q. Four employees?

A. Yes, sir.

Q. Your duty--you are just really a billing agency, wouldn't you say that?

A. Yes, sir. Our main function, of course, is to represent the water users in the District, and we are in reality a fiscal agent for the Bureau of Reclamation.

Q. Do you have anything to do with the water that is released other than to tell whether or not a man is delinquent?

A. No, sir.

Q. That is all you do?

A. That is all.

Q. In other words, the District is simply a fiscal agent which sends out bills and collects the money and notifies the Bureau of Reclamation whether or not the man is delinquent?

A. That is right.

Q. If he is delinquent he doesn't get his water?

A. That's right. That is one of the functions, yes.

Q. And the District doesn't own any water rights, of course?

A. No, sir.

Q. Now, you mentioned in your direct testimony that there was eighty-nine thousand accounts located in the District?

A. Eighty-nine hundred.

Q. Eighty-nine hundred. I beg your pardon. About six thousand of those are those which are simply residences located in the District?

A. I would say that there are six thousand of those accounts who are the owners of two acres or less of the District land.

Q. And I believe there are only 2900 real farmers in the District, that is your estimate?

A. I think there are 2900 ownerships of two acres or more; or more than two acres, let me put it that way.

Q. Twenty-nine hundred?

A. Yes, sir.

Q. Mr. Phillips, do you know of any arrangements that have been made by the District to take over the irrigation facilities after construction charges are paid off?

A. No, sir.

Q. As far as you know there haven't been any such arrangements, have they?

A. No, sir.

Q. Mr. Phillips, in your deposition which was given in August of this year, you were requested to furnish certain information and exhibits, and it states: "In connection with information requested on Page 7 of this deposition, concerning permits held by the District for the appropriation of waters of the Rio Grande, which said information was to be furnished later by the witness, Mr. N. B. Phillips, the following statement was submitted to the Court Reporter by Mr. Phillips on November 3, 1954 as his answer to the question propounded by Mr. Brockmoller: A search of the records in the office of the El Paso County Water Improvement District Number One does not disclose that there are any permits or authorizations." Is that correct?

A. That is correct.

Q. Mr. Phillips, you are familiar with the bridges across the Franklin Canal located in the City of El Paso, are you not?

A. Well, to the degree that I sometimes pass over some of them and pass by some of them

Q. Well, I will ask you this, the City has made request to the District to build and re-construct certain bridges across the canal, haven't they?

A. Yes, I think they have.

Q. And the City made demand upon the District, did they not, for the sum of $51,347.69 for the cost of three bridges at Copia, Piedras and Verde Streets, did they not, across the Franklin Canal?

A. That is right.

Q. And that demand was turned down by the District, is that correct?

A. Well, no action has been taken by the Board of Directors on it.

Q. It hasn't been paid yet?

A. No, sir.

Q. No part of it has been paid?

A. No, sir.

Q. How long has it been pending now, Mr. Phillips?

A. Well, I think you have the date there, don't you?

Q. I don't have the date, no.

A. Well, it was three or four months.

Q. Is your District incorporated under the laws of the State of Texas?

A. Yes.

Mr. Grambling:

We pass the witness, Your Honor.

On Re-Direct Examination:

Questions by Mr. Scott:

Q. Mr. Phillips, I think you previously stated that the District levies a minimum charge against the owners of water-right lands and that that minimum

charge entitles the landowner to two acre feet of water per acre provided, of course, the water is available?

A. That is correct.

Q. And that any water used by that landowner in excess of two acre feet must be paid for any an additional charge?

A. That is right.

Q. What has been the average or usual charge made for what we will call that excess water?

A. Since I have been connected with the District the charge has been established at one dollar an acre foot.

Q. Paragraph 7, Subsection (1), of the contract of August 10, 1949, reads: "For each and every acre-foot of water diverted and used by the City for the diversion and use of which Project works are used, the City will pay at the same rate of charge per acre-foot then prevalent for excess water as made by the District against its lands. 'Excess water', as used in this paragraph, means those waters delivered to district lands, in addition to that which may be delivered to said lands by the District upon the payment of the District's minimum charge." Now, let's just talk for a moment about the water that the City would be entitled to take under this contract of August 10, 1949. Is it correct that the District has billed the City at the rate of one dollar per acre-foot for each and every acre-foot transported through Project facilities for the City's benefit and use?

A. That is correct.

Q. Now, Mr. Phillips, before the water that would be used by the City under this contract of August 10, 1949 gets into the American or All-American Canal, has that water been transported through Proj-

ect facilities above the All-American Canal and American Dam?

A. Yes, sir.

Mr. Grambling:

That calls for a conclusion. We'd like for the witness to delineate what facilities.

Q. All rght, sir, I will ask you, are there or not canals and drains and diversion dams, all part of the Project works, which are situated above the American Dam and which are used in transporting Project water from the time of its release from Caballo Dam until it gets into the American Canal?

Mr. Grambling:

That is a leading question. This witness doesn't need to be informed as to what—

The Court:

Well, let's avoid leading questions. Now, I think I remember some testimony here that certain waters released up at Caballo Dam would, through laterals, and so on and so forth, a certain portion of this water would work itself way down and go into use somewhere up here in what you call the Upper Valley, I think?

Mr. Scott:

Yes, sir.

The Court:

And that that water might make the whole trip without ever being in the river bed anymore?

Mr. Scott:
Yes, sir.

The Court:
But I don't know whether the testimony is that any of that same water would ever get to this American Canal or the Franklin Canal, so I think it is a pertinent question to find out what facilities he is talking about.

Mr. Scott:
Well, Your Honor, photographs have been introduced in evidence here showing a great many structures of the Project and facilities, beginning with Caballo Dam and coming right on down.

The Court:
What I mean is, in order that the record be clear, let the witness state what he is talking about.

Mr. Scott:
All right, sir.

Q. Mr. Phillips, will you describe, if you have knowledge of them, what structures and facilities of the Project are used in transporting water released from Caballo Dam and getting into the American Canal?

A. Well, I would say that certain portion of the water which gets into the American Canal must traverse first through the Percha Dam and probably from there through the Arrey Canal and through wasteways from the Arrey Canal back to the river, and then following a course down the river probably some of it would no doubt get into the Rincon and

Hatch Siphons, which are part of the Project works, and it would then get down as far as the Leasburg Dam where the Leasburg Dam would be utilized in its transportation and maybe some of it—I want to correct that—some of it would go through the Leasburg Canal and out wasteways back to the river; thence to the Mesilla Dam, and through the East and West side canals back to the river. Also, by the time it had arrived at the All-American Canal, or the All-American Dam, rather, the water affected by the drains would be co-mingled with it and it would ultimately reach the American Dam and the All-American Canal.

Q. And, or course, up above all of those structures and facilities are Caballo and Elephant Butte Dams which are part of the Project works?

A. Yes, sir. I was merely describing its course after it left Caballo.

Q. Yes. Mr. Phillips, is there a uniform charge made to all water-right lands in the El Paso District regardless of whether those lands are situated near or far removed from canals?

A. The rates are the same on all classified lands.

Q. I believe it is in evidence that there is approximately ten thousand acres of water-right lands within the El Paso District above the American Dam; in other words what we speak of as the Upper Valley in El Paso County?

A. That is known as the Mesilla portion in Texas, the Mesilla-Texas portion of the El Paso County Water Improvement District Number One, commonly referred to as the Country Club area, and contains about ten thousand acres.

Q. Those landowners up there, of course, don't use the All-American or Franklin Canals at all?

A No, sir.

Q. Are they, if they obtain excess water, water over and above the two-feet allowance on your minimum charge, are they charged the dollar per acre?

A. Yes, sir.

Q. The same charge that the City of El Paso is charged for the use of the Project facilities?

A. The excess water rates are the same.

Q. Throughout?

A. Throughout.

Q. Is it correct that under the contracts between the El Paso District and the Government the El Paso District is paying forty-three percent of the cost of constructing all of the project facilities?

The Court:

That has been stated two or three times.

Mr. Scott:

Pardon me, Your Honor.

Q. Mr. Phillips, you have been asked questions as to whether the District paid for any of the cost of channelization or rectification of the river, or for the cost of constructing the All-American Dam and the All-American Canal, and you answered in the negative. Does the District charge any landowners or water user for the use of any of those facilities?

A. No, sir.

Q. Constructed by the International Boundary Commission?

A. No, sir.

Q. Is the District billed by the Bureau of Reclamation for the use of any works or services done or performed by the International Boundary Commission?

A. No, sir.

Q. If the District were so charged it would be passed on to the water users?

Mr. Grambling:

That calls for one presumption on top of another and I don't know what bearing it would have on this lawsuit at any rate.

The Court:

Sustained.

Q. Do the farmers who own land below the Riverside heading—how far down the river is that heading?

A. About five miles.

Q. All right. The farmers below the Riverside heading pay exactly the same charges for water that farmers do who get their supply out of the Franklin Canal?

A. Yes, sir. Same rates prevail over the entire District.

Q. Even though the water that is put into the Riverside heading may not even have passed through the All-American Canal or the Franklin Canal, it may have gone down the river and into the Riverside heading, those farmers would still pay the same cost, the same charges, as landowners taking water out of the Franklin Canal?

A. That is true.

Q. I will ask you if you know whether the City of El Paso makes uniform charges for water consumed by the citizens of El Paso regardless of where the citizen may live?

A. I understand they do.

Q. Well, if I live in the shadow of the City's reservoir and you live five miles away, do you know whether or not we pay the same water rate?

Mr. Grambling:

We think that is just argumentative. We don't believe that could have any bearing in this suit. That is getting far afield.

The Court:

I would assume it is true but I don't think it has much bearing here.

A. I think it is true.

Q. Mr. Phillips, I think you testified that when the contracts of November, 1937, between the Elephant Butte District, the United States, and the El Paso District, were entered into, that a four million dollar credit was allowed for conveyance of power rights. Was that four million dollar credit allowed both districts?

A. Yes, sir.

Q. Of that amount the El Paso District got forty-three percent?

A. Forty-three and a fraction percent, and the upper district fifty-six and a fraction percent.

Q. You know whether within the last year or two years the El Paso Electric Company has been obtaining its major portion of its water supply from the river or the Montoya Drain?

A. I know that the flow of the Drain and the river during the last probably two or three years has been inadequate to meet the requirements of the El Paso Electric Company for cooling purposes in their generators.

Q. And what did the company do, if you know?

A. They drilled about eight wells and piped water into cooling towers for the purpose of cooling their generators.

Mr. Scott:

That is all.

On Re-Cross Examination.

Questions by Mr. Grambling:

Q. Mr. Phillips, one thing I want to ask you about. Under the contracts of '41 and '44, where the City got water rights on certain land, that took that land out of cultivation, didn't it?

A. Yes, sir.

Q. And it took that much water away from the farmers, didn't it?

A. No, sir. I don't think so.

Q. You think they would have gotten the water even if the City used it?

A. The City is using it in the water treatment plant.

Q. Well, it takes land out of cultivation?

A. Yes, sir.

Q. And to that extent it is detrimental to the irrigation project?

A. I don't think so. I think under the terms of the contract, if I remember correctly, the land was to be so acquired with the approval of the Manager of the District so that it would not interfere with the economic setup of the District.

Q. Well, you don't think the mere fact you make a statement of that kind in a contract necessarily controls? What I am trying to say is that it does affect the economic setup of the District, doesn't it,

when you take fourteen hundred acres out of the project?

A. Well, if you are trying to say that there would be that much less crops raised.

Q. Well, there would be, wouldn't there?

A. That is correct.

Q. Under that contract they can't plant crops?

A. They can't plant it by the use of surface water delivered by the project, I mean, project water.

Q. Yes, sir.

A. But in most cases they are planted by having drilled wells in the land.

Q. But they can't plant it by irrigation water?

A. That is right.

Q. And in those days there weren't any wells, were they? Wells are a new thing?

A. The real wells of any consequence were wells drilled in 1951.

Q. Now, Mr. Scott asked you about this contract of 1941 and 1944—Mr. Scott asked you about these facilities, these dams and diversion dams, and so forth. Now, those facilities he asked you about which he said were used for transporting the water, they are used for diverting the water, are they not?

A. Well, they are used in not only diverting but in transporting too.

Q. Well, do those dams help to move the water along?

A. Well, to this degree, the dams serve two purposes; They divert water and they also prevent the water from coming on down the river to the river gates.

Q. And they hold it down to that extent [illegible] the gates were open?

A. Yes, sir.

Q. If the dam wasn't there the water would come more freely?

A. Oh, yes.

Q. So instead of being a help they are a hindrance to the transportation of the water?

A. Probably for usual purposes, but in the operation of the District they may be of considerable advantage.

Q. Well, they are an advantage in that they make it possible to irrigate the land?

A. Yes, and they regulate the flow to the degree that is necessary to make deliveries.

Q. To the farms?

A. To the farms.

Q. Just looking at it for a moment, and letting every other consideration out of your mind, as far as the transportation advantage, they don't add a dime to the transportation but they take from it?

A. The diversion dams from the standpoint of transportation of water would certainly hinder rather than help it.

Q. Now, one other thing. He asked you about everybody paying a dollar for excess water over and above the two acre feet. I believe you say you are even charging the City of El Paso for water they pump out of the wells at Canutillo?

A. That is right.

Q. And that water is certainly not transported by any project facilities except a mile and a half of the Franklin Canal, is it?

A. Well, of course, in order to get to the river it is my understanding that certain Project facilities in the Canutillo area are used, like the Canutillo wasteway and the drains.

Q. But those drains go right through the land that the City owned that you are talking about?

A. Yes, but I don't think that the wells pump directly into the river. I think that some Project features are used in order to get the water into the river.

Q. They are going into drains that are located on the land owned by the City?

A. I can't say as to that. I have heard testimony given where the City didn't own all facilities.

Q. Have you any record on the return flow Mr. Scott asked you about there? You mentioned that there's a good deal of return flow. Have you any measurement of the amount of water of the return flow?

A. I don't have in my office, no, sir.

Q. You know of any such record?

A. The Bureau of Reclamation has the complete record of the drain return flow.

Q. They have that?

A. Yes, sir.

Q. Well, Mr. Phillips, I believe you said you would get that Electric Company contract for us when you get off the stand?

Yes, sir.

Mr. Grambling:

All right. We have no further questions. We'd like to see that contract.

Mr. Edwards:

That's all.

The Court:

Let me ask a few questions, please.

Questions by the Court:

Q. (Referring to map on blackboard): I want you to look over there, the City water treatment plant, and then the line indicating the river intake connected to that plant. You see what I am talking about?

A. Yes, sir.

Q. Is there such a river intake?

A. Yes, sir. To the best of my knowledge, Your Honor, the City has what they call a river pumping plant right at that location, and they take water from the river and pump it into that intake to their City treatment plant.

Q. Well, was that intake connection built by the City, if there is such a structure?

A. Yes, sir.

Q. Do you keep any record or track of the amount of water that the City might draw from the river through that intake into the plant?

A. No, sir.

Q. It would seem from some of the testimony I have heard that in recent years maybe it has been rather slim pickings, but that hasn't always been true?

A. That is true, sir.

Q. Well, now, are there any charges referrable to that particular water which would be reflected in any of the statements that you have presented here as items owed by the City to the District?

A. You mean from the water that the City pumps out of the river?

Q. Yes?

A. No, sir, there's no charges reflected in those bills for any of that water.

Q. The City is not asked to pay the District anything on account of any of that water?

A. No, sir.

Q. There's been a good deal said here about this return flow and the sub-surface drainage, I think it could be, is that right?

A. Yes, sir.

Q. And what are those drain facilities, is it tile drainage or what?

A. No, sir. They are all open gravity-type drains.

Q. Plaintiffs' Exhibit Numbers 148a through 148e are statements on sheets headed "Statement Water Charges". Now, these are the charges that you trace to the contract of August, 1949?

A. With the exception of the red copy, Your Honor, and that is excess water under the other two contracts. The bottom exhibit there is for excess water in 1953 under the contracts of '41 and '44. The others are under the contract of August 10, 1949.

Q. Well, this other pad of exhibits—Exhibit 148f—it covers quite a period here?

A. Yes, sir.

Q. These statements, which are headed "Inventory of Taxable Property", as I understood, were statments that would trace to the contracts of 1941 and 1944?

A. That is true, sir.

Q. And then—well, they are the ones that deal with the flat minimum charge?

A. Yes, sir.

Q. And then where there is an excess charge that is billed separately?

A. Yes, sir.

The Court:

All right.

On Re-Direct Examination.

Questions by Mr. Scott:

Q. Mr. Phillips, in answer to a question directed to you by the Court as to whether the City is charged for water pumped direct from the river, you stated no charge was made for such water. I want to ask you if you desire to correct that statement by making an explanation as to when that water is charged for and when it is not charged for?

A. During the summer months, when there is Project storage water, Project water, in the river, and it is pumped by the City into the City treatment plant, there is a charge made; but during the winter months, after the gates are closed and the water is pumped out of the river into the City treatment plant, there is no charge there.

Mr. Scott:

That is all.

On Re-Cross Examination.

Questions by Mr. Grambling:

Q. Mr. Phillips, what you are telling us is that during the irrigation season there is a charge for all water taken out of the river there by the City?

A. Yes, sir.

Q. Regardless of whether it is Project water or what water, if it is taken out of the river or Franklin Canal during the irrigation season you make a charge against the City for it?

A. That is right.

The Court:

Well, how is that charge registered, on which type of these statements?

The Witness:

All of these charges for water taken out of the canal or out of the river, as I have corrected my statement to say, are given to my office by the Bureau of Reclamation, and they would be charged under those white forms.

They would be charged on the statement, that is headed "Statement of Water Charges"?

The Witness:

That is right.

By Mr. Grambling:

Q. Is there any segregation between the water taken from the river and the water taken from the canal there in those charges which you have rendered against the City?

A. I don't believe there is.

Q. Could the Court or anyone else tell how much water was taken out of the river during those years during the irrigation season?

A. I would have to check from the Bureau figures to see whether some of that water was included.

Q. I thought you just testified that during the irrigation season you did charge the City for water they took whether they took it out of the river or took it out of the canal?

A. I did.

Q. Well, it is shown in that statement, isn't it; it is included in the statement, I mean?

A Yes, sir. I believe it is.

Q. You mean it is included in the statement?

A. Yes, sir.

Q. But you don't know how much is river water and how much is canal water?

A. Not from that statement.

Q. And there is no way anybody could tell, is there, from that statement?

A. No, sir.

Mr. Grambling:

Pass the witness.

On Re-Direct Examination.

Questions by Mr. Scott:

Q. Mr. Phillips, does the Bureau of Reclamation supply your office with the amount of water that has been used by the City or taken by the City from both the Franklin Canal and the river?

A. Yes, sir.

Q. Is it based on those quantity figures so supplied by the Bureau that you send out these statements?

A. That is right.

Q. You made the statement that the City is charged for water taken out of the river during the irrigation season. I will ask you whether or not if there are flood waters in the river over and above. by flood waters I mean waters over and above the amount released from Project storage. is the City permitted to take those flood waters without charge?

A. I believe they are.

Mr. Scott:

That is all.

On Re-Cross Examination.

Questions by Mr. Grambling:

Q. Well, it is all under your direction? That is all set out in those contracts?

A. Just what do you mean by that?

Q. August 10, 1949?

A. The August 10, 1949 contract, as I interpret it, provides the conditions under which the City is permitted to take water through Project facilities and also sets the rate.

Q. And also out of the river?

A. Yes, sir.

Q. And provides that you determine when they can do it and under what conditions they can do it?

A. Well, the Project Manager is authorized.

Q. I mean the Project Manager?

A. Yes, sir.

Mr. Grambling:

I believe that is all.

(Witness excused.)

RAYMOND A. HILL, a witness for the Plaintiffs having first been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Edwards:

Q. State your name, please.

A. Raymond A. Hill.

Q. What is your business or profession?

A. Consulting Engineer.

Q. Where do you live?

A. I live in Pasadena, California, with office in Los Angeles, California.

Q. What is your educational background, Mr. Hill?

A. Bachelor's Degree in Civil Engineering, University of Michigan, graduating in 1914. Professional degree of Civil Engineer from the same university in 1922.

Q. What has been your practical experience as an engineer since your graduation?

A. From the time of graduation in 1914 until the beginning of World War I, I worked for the Reclamation Service, the predecessor of the present Bureau of Reclamation, on the Grand River Project in Colorado, the Strawberry Project in Utah, and the Yuma Project in Arizona. I then spent the full period of the first World War in the Service, returned and was employed by the consulting firm of Clinton, Holt & Hill, Los Angeles; and became a partner of that firm in 1926. I have been a partner of that firm and its successors continuously since then. The practice of the firm has been almost entirely in the fields of hydraulics, irrigation, power development, reclamation, flood control. My own work has been throughout all of the Western states and a great number of foreign countries.

Q. In what foreign country have you carried on work, Mr. Hill?

A. Well, Mexico, Haiti, Greece, Turkey, Iraq, Pakistan.

Q. And have you been the engineer advisor to the United States in any capacity or to any of the various States?

A. I am Consulting Engineer to the State of California on some five different engagements, currently having to do with water and water problems gen-

erally, and hydraulic structures. I have been retained by the State of Texas since 1938 on matters of the Rio Grande Compact. I have been retained by the State of Colorado to pass on and advise on problems of water supply, particularly as to its share of Colorado River water to which the State of Colorado is entitled. I have been at various times, and I presume I still am, on the panel of consultants for the Department of State in connection with the work here locally, the Boundary Commission, the Department of Defense, both to the Corps of Engineers of the Army and to the Public Works of the Navy; Consultant to the Department of the Interior on several different occasions; and retained by the Department of Justice in connection with disputes over the waters of the upper Colorado; and I have done some special work for the Atomic Energy Commission.

Q. How far back does your experience with the waters of the Rio Grande extend?

A. My first physical contact with the Rio Grande was in the Fall of 1913 when I stopped and made an inspection of the construction of the Elephant Butte Dam, at the time the foundations were opened and they were just beginning I think to place concrete. During the period from then to 1920, approximately, I had no direct knowledge of it. I had indirect knowledge because my father was the senior officer of the Reclamation Service in that area and this area for sometime. In the early 20's the firm were consulting engineers to the Hudspeth District and that particular job was detailed to me and I did considerable of the work in the early stages of development of the Hudspeth Project, which adjoins this Project. In and about 1926 and 1927 the firm reported to the City of El Paso—I am not sure whether it was officially to the City or to the Chamber of Commerce—on the

possibility or feasibility, let us say, of bringing waters from Elephant Butte Reservoir through a high-line canal for use in El Paso—no, excuse me, I am wrong in that. That was the previous report, in which I merely did some routine work. The one I referred to in 1927 was a report on power development at Elephant Butte. The early report was made about the time I got out of the Service and I was merely familiar with it. Then commencing early in the 1930's, I think actually in 1933, I was retained by the Elephant Butte Irrigation District to prepare a report to the Public Works Administration on the canalization of the Rio Grande from Caballo Dam to the international boundary. That is the work that has been referred to here. After that work was authorized I acted continuously in connection with that project as a consultant on it as consulting engineer of the International Boundary Commission, the American Section, and was concerned directly with the designs and the early stages of construction of that particular Project. Then about 1936, when the use of water in New Mexico suddenly increased, and an action was brought by the State of Texas against the State of New Mexico in the case filed in the Supreme Court of the United States, I was retained to assist the State of Texas and the Districts—the Elephant Butte District and the El Paso County Water Improvement District—who, for fiscal reasons, were paying a considerable part of the money in the preparation of that case. I continued with that case and somewhere in the picture, I don't recall the date, the payments ceased to be made by the Districts and were made by the State of Texas. I then participated as advisor for the State of Texas in the National Resources investigation of the upper Rio Grande, a copy of which has been referred to here and read into the record:

and immediately following that the negotiations of the Rio Grande Compact, the recent Compact of 1938, were initiated and I was the engineering advisor to the Rio Grande Compact Commissioner for Texas throughout those negotiations, and have been the engineering advisor to the Rio Grande Compact Commissioner for Texas continuously thereafter.

Q. Did you participate in the drafting of the Rio Grande Compact of 1938 to the extent of representing Texas in the preparation of the engineering data on which that Compact was based?

A. Yes. The Compact as written embraces almost verbatim the reports submitted to the Commissioners by the engineering advisors. There are some of the articles of the Compact which were drafted by a legal committee, but those provisions which were technical in nature—and by "technical" I mean engineering in nature—were drafted by the engineering committee, and incorporated almost without change in the final document. I personally had to do with the writing of those provisions and I guess actually did most of the writing because I acted as secretary of the engineer sub-committee.

Q. In the investigation and report of the National Resources Committee, to which you have referred, which ante-dated the Rio Grande Compact, was the Rio Grande itself regarded in effect as consisting of two streams, one from its source to Fort Quitman and the other from Fort Quitman to the Gulf?

A Well, the Compact specifically refers only to the waters of the Rio Grande, from its origin in Colorado to Fort Quitman, Texas, which is the same language as used in the treaty with Mexico, the Treaty of 1906 or 1907; and also the lower portion from Fort Quitman to the Gulf is referred to in the more recent treaty, I believe 1945. In other words, it

was always considered that the Rio Grande in effect was two rivers, one that ended at Fort Quitman and another that started at Fort Quitman.

Q. Do any of the waters of the Rio Grande originating above Fort Quitman reach the lower Rio Grande to any appreciable extent?

A. Well, there are some waters that undoubtedly reach there, but the amount is not large. The only waters which reach Fort Quitman—except in years like 1942, which is the only time that it spilled at Elephant Butte—are either waters which are returned from drains below El Paso, either on the Mexican side or the American side, and occasional operating wastes which are not used by farmers below the Project; and flash floods that come off of the arroyos and pass Fort Quitman. The total quantity of water which reaches Fort Quitman, oh, ranges—by memory now I will say—from roughly a hundred thousand acre feet to two hundred thousand in most years. In recent years I think it has been less. Some years back it used to be more. The principal contributions to the lower Rio Grande are from the rivers that come in out of Mexico.

Q. Some reference has been made by counsel for the City in this case to the Falcon Dam. Do you know where that is?

A. I know in a general way. It is on the lower Rio Grande below Laredo.

Q. Do you know what the source of supply for the Falcon Reservoir is?

A. With the exception of a small amount of water which passes Fort Quitman and is not used in the Presidio Valley, the waters at Falcon are from the lower Pecos River, Devil's River, and other streams entering from Texas, but the primary supply is from the larger rivers which enter from Mexico.

Q. You are familiar with the Treaty of 1906 between the United States and Mexico?

A. Yes, sir.

Q. Is the Falcon Reservoir in any way connected with that Treaty of 1906?

A. No, because that treaty refers only to the Rio Grande above Fort Quitman.

Q. Now, do you know whether or not there is a Federal Reclamation Project at Falcon Reservoir?

A. To the best of my knowledge, and I believe it is correct, there is no Federal Reclamation Project.

Q. At Falcon?

A. At Falcon.

(At this point an instrument was marked for identification as "Plaintiffs' Exhibit Number 149".)

Q. Mr. Hill, I hand you Plaintiffs' Exhibit Number 149 and ask you to examine that and state what it is.

A. It is a series of graphs, including six sheets showing the amount of water pumped from wells by the City of El Paso.

Q. For what period of time?

A. The period of 1944 through 1953 inclusive.

(At this point a recess was had from 12 o'clock Noon until 1:30 o'clock PM. the same day, at which time, with witness, Raymond A. Hill, back on the stand, proceedings were resumed as follows):

By Mr. Edwards:

Q. Mr. Hill, before the Noon recess I handed you Plaintiffs' Exhibit Number 149, which I believe you had identified as being a graph made of the water

pumped from wells by the City of El Paso from 1944 to 1953, is that correct?

A. That is correct.

Q. From what data did you prepare this graph?

A. The graph was prepared from data attached to the deposition of Mayor Hervey which is, I believe, introduced separately here in evidence, but I don't recall the exhibit number.

Q. And does this graph show first the total pumping from wells by the City of El Paso, and then the breakdown, pumping from wells designated A, B & C; and then again from wells numbered 3, 4, 9, 14, 17 & 18; and then from wells numbered 8, 11, 12, 15, 16, 19, 20, 21 & 22; and on the next one, 23, 24, 25 & 26; and then separately, the pumping by the City from wells at Canutillo; is that correct?

A. That is correct.

(The exhibit was then shown to opposing counsel.)

Mr. Grambling:

Your Honor, we don't believe this is material to any issue in this case. It shows the water pumped from wells by the City of El Paso. I don't know what bearing this has on the rights or issues, rather, of this suit.

Mr. Edwards:

We want to use it in connection with the data attached to Mayor Hervey's deposition.

Mr. Grambling:

I don't think that adds materiality to the thing. They have asked for certain data to Mayor Hervey's deposition and now they want to put in something in connection with it.

Mr. Edwards:
That is right.

Mr. Grambling:
We don't think any of it is pertinent to this lawsuit.

The Court:
Let me see it.

(The exhibit was then handed to the Court.)

The Court:
It might be of some relevancy on one feature and I will overrule the objection.

(Plaintiffs' Exhibit Number 149 was thereupon received in evidence by the Court but this exhibit is not considered to be pertinent to points of appeal and is being omitted from this record.)

Q. Mr. Hill, I hand you an exhibit marked "Plaintiffs' Exhibit Number 150" (Reporter marks same), and ask you to state what that is, please.

A. The exhibit consists of one sheet for each year from 1897 to 1914 of daily hydrographs of flow in Rio Grande at San Marcial gauging station, and at the gauging station just above El Paso.

Q What is a hydrograph?

A. A hydrograph is a plotting with respect to time showing the rate of flow in the river, in this case plotted as the mean daily flow for each day for these years up to a maximum of 2500 cubic feet per second.

Q What is the source of your information on which you prepared these graphs?

A. The records of the United States Geological Survey and the records of the International Boundary Commission.

(The exhibit was then shown to opposing counsel.)

Mr. Grambling:
Your Honor, we'd like to ask one clarifying question on this exhibit.

The Court:
All right.

Mr Grambling:
I notice, Mr. Hill, that you have 2500 as a maximum, 2500 second feet as a maximum volume that you show here. That doesn't mean there wasn't any greater volume, that only means you carried it that high, doesn't it?

The Witness:
That is correct. In the portion of the graph where it goes up the flow in those intervening days was in excess of 2500.

Mr. Grambling:
Thank you. We have no objection.

(Plaintiffs' Exhibit Number 150 was thereupon received in evidence by the Court. However, this exhibit is not susceptible to being copied and is to be forwarded up as an original for consideration by the Court of Appeals by order of the trial Court.)

Q. Mr. Hill, have you made a comparision of those hydrographs showing the daily flow at San

Marcial and near El Paso for the years indicated by you in your testimony?

A. Yes, sir.

Q. And, as disclosed by that comparison, have you prepared an additional graph bearing on the subject which I now hand to you, marked "Plaintiffs' Exhibit Number 151" (Reporter marks same)?

A. Yes, sir.

(The exhibit was then handed to opposing counsel for examination.)

Mr. Grambling:

No objection.

The Court:

May I see that?

Mr. Edwards:

Yes, sir. (Hands same to the Court.)

The Court:

All right.

(Plaintiffs' Exhibit Number 151, being a graph entitled "Annual Discharge of Rio Grande at San Marcial and Periods of Low Flow in Rio Grande above El Paso", was thereupon received in evidence by the Court, and a photostatic copy of same appears on the following page):

Note

Page 1069 is on Card 22

Q. Mr. Hill, I wish you would explain to the Court in detail just how this graph is laid out and the significance of it and what it discloses with reference to the comparison between the flows at the two points?

A. Is that Exhibit 151 you are talking about?

Q. Yes. Just go ahead and explain it to the Court.

A. Exhibit 151 is entitled "Annual Discharge of Rio Grande at San Marcial and Periods of Low Flow in Rio Grande above El Paso." It is a graph, the scale horizontally being five hundred thousand acre feet per inch, the scale vertically being days fifty days to the inch. The quantities along the bottom of the graph are in units of thousands of acre feet, annual discharges. The quantities vertically are in the number of days. The points on the graph plotted in circles with a dot in the center and with a number alongside are the positions corresponding to the year indicated and the discharge of the Rio Grande at San Marcial for that year or in that year. For example, in the year 1903, the discharge was more than a million and a quarter acre feet. In that year there were approximately 115 days in which the flow did not exceed ten cubic feet per second at El Paso. Another example, in the year 1913, the discharge of the Rio Grande at San Marcial was a little more than five hundred thousand acre feet, and there are almost one hundred days at El Paso in which the flow of the Rio Grande did not exceed ten cubic feet per second

The Court:

What is that year now?

The Witness:

1913, sir.

The Court:

Yes. I see it. What did you say about it?

A. 1913 was the year in which the flow at El Paso —or, excuse me—the flow at San Marcial in that year was a little more than five hundred thousand acre feet. In that same year there were almost one hundred days in which the flow at El Paso did not exceed ten cubic feet per second. Another example, off on the lower right-hand portion of the diagram, is the year 1906, which was one of the wet years of record, and in that year the flow of the Rio Grande at San Marcial was between 1500 and 1600 thousand, that is a little over a million five hundred thousand acre feet, and as it was a wet year the number of days during which the Rio Grande at El Paso was less than ten cubic feet per second was only about ten days. Toward the other extreme of the diagram in the upper left-hand corner, in the year 1902, which was one of the driest years of record, the flow of the Rio Grande at San Marcial was only about two hundred thousand acre feet and consequently the flow of the Rio Grande at El Paso did not exceed ten cubic feet per second for almost 230 days. The curve on the diagram which commences with the upper left-hand corner and extends downward into the right and touches the bottom of the diagram at about the two million-acre-foot discharge point is what we technically call an "envelope" curve. It is a curve which envelops all of the plotted points. The significance of that curve is that in each year prior to construction of Elephant Butte Dam for any given discharge of the Rio Grande at San Marcial one reads vertically to that curve, and then horizontally to the scale at the left, that is the minimum number of days throughout which the flow of the Rio Grande did not

exceed ten cubic feet per second at El Paso. The lines and numbers on the lower side of that curve represent the flow of the Rio Grande at San Marcial, during the recent period from 1946 to 1953, which were generally dry periods. For example, taking the year 1947, which occurs just a little below the center of the diagram, the discharge of the Rio Grande at San Marcial was a little less than five hundred thousand acre feet, reading from the scale, perhaps 450,000 acre feet, in that year. The intersection and line under the figure "1947" touches the envelope curve at a level corresponding to about 110 to 115 days, from which one may properly conclude that if it had not been for Elephant Butte Dam, the regulation afforded by the reservoir and the operation of the works, that are downstream from the reservoir, in 1947 there would have been at least 110 days in which the flow of the Rio Grande at El Paso would not have exceeded ten cubic feet per second. It might have been like in 1900, a flow of approximately equal magnitude at San Marcial when actually there were 225 days in which the flow did not exceed ten cubic feet per second, but the intersection of the line reading vertically corresponding to the flow of 1947 at San Marcial to the intersection of the curve shows that based on past performance without the Elephant Butte or the Rio Grande Project in operation there would have been at least 110 days with no flow in the river at El Paso exceeding ten cubic feet per second. The other years are shown on there, the one furthest to the right below the curve being 1949. In that year the total discharge of the Rio Grande at San Marcial was a little in excess of one million acre feet, indicating that there would have been at least forty days at El Paso, at least forty days in

which the flow of the river at El Paso would not have exceeded ten cubic feet per second. In 1948, the number of days indicated is almost fifty. In 1952, which was practically a million acre feet at San Marcial, it is indicated that approximately forty-five days or more were not over ten cubic feet per second at El Paso. There are three years on the diagram in which the flow was about the same, 1946, 1950 and 1953, where the flow at San Marcial was between 200 and 300 thousand acre feet, and in those periods, those years, rather, the periods of flow less than ten cubic feet per second at El Paso would have been as shown by the curve at least 150 days; 150 days of that very low flow. The year 1951 was so dry at San Marcial that the corresponding point falls outside of the limit of the curve based on previous data, so that all one can say is that it would be perhaps 250 days or even more in which the river flow at El Paso would have been only a nominal flow of ten cubic feet per second or less if the Elephant Butte reservoir had not been in operation and the Rio Grande Project had not been in operation.

Mr. Edwards:

You may take the witness.

On Cross Examination.

Questions by Mr. Grambling:

Q. Mr. Hill, I notice from what Mr. Resch testified yesterday with reference to the annual flow of the river at El Paso, based on the records of the International Boundary Commission, that he said in 1900—have you got this diagram before you or not? (Indicating.)

A. Yes.

Q. He said in 1900 there was 172 days at El Paso of zero flow. Is that borne out by your diagram?

A. Yes. On the diagram, the point plotted on the diagram for 1900 is 225 days, approximately, from my notes it is 225 days in which the flow did not exceed ten cubic feet per second.

Q. But you haven't got the zero flow? You show the zero flow on your map?

A. No.

Q. You simply show it as less than ten feet?

A. I show it less than ten as being substantially a dry river.

Q. He shows less than a hundred cubic feet per second for 282 days. Does your chart show that information?

A. It does not. It does not show that.

Q. He shows zero for 112 days in 1901. What do you show with reference to less than ten feet, how many days?

A. 119.

Q. He shows 155 with zero flow in 1902. What is your "less than ten feet" item?

A. 226 days.

Q. He shows 20 days in 1903 of zero flow. What is your item on that?

A. 117 days.

Q. He shows 162 days for 1904. What is your item on that?

A. 210 days.

Q. What is your item in 1905?

A. Zero days.

Q. 1906?

A. Eight days.

Q. He shows that there were zero days that had zero flow in 1907. What do you have in 1907?

A. Zero days.

Q. Now, the dam was built so it started—it wasn't completed, of course—but so it started storing water in what year, Mr. Hill?

A. The flow of the river passing Elephant Butte Dam was modified slightly in 1914, but the actual storage did not take place until about a year or year and a half later.

Q. I was going to ask you if the actual storage didn't start in 1915?

A. It started in 1915 but in 1914 the concrete was up above the river bed and when the flow came down it would be temporarily impounded and then released through the diversion works they had at the time so in 1914 there was some slight effect on the flow of the river.

Q. And the dam I believe was completed in 1916, isn't that right?

A. That is my recollection, yes, sir.

Q. Have you got any information, Mr. Hill, which would give us a comparision of the yearly average of the flow at El Paso for the years 1889 to 1915 when the dam was built, and the same information for 1916 through 1950, in acre feet?

A. No, I do not, Mr. Grambling. I have in my notes a tabulation of the annual runoff at San Marcial from 1897 to 1953, and actually up to October 31, 1954, but I don't have any records prior to '97, and I haven't taken any average.

Q. You haven't taken the average from 1897 through 1953?

A. No. I could read it approximately from the graph that has been introduced, if that will serve your purpose.

Q. Let me ask you this, Mr. Hill; was the average flow of the water more at El Paso—on an annual basis I am talking about—was it more after the dam was built or before the dam was built?

A. At El Paso?

Q. Yes, sir. In other words, what effect did the dam have on the annual flow of water at El Paso?

A. Well, all other conditions above Elephant Butte being the same, the annual flow at El Paso was undoubtedly somewhat less.

Q. Well, as a matter of fact, see if this figure sounds reasonable to you: Wasn't the average flow at El Paso from 1916 to 1950, 236,000 acre feet less per year than it was prior to the time the dam was built, say 1889 to 1916?

A. I would just be speculating.

Q. I don't want you to speculate. Wouldn't you say that the building of the dam did materially reduce the flow of the river at El Paso, the annual flow I am talking about?

A. Reduced it to the extent of additional consumptive uses between Elephant Butte Dam and El Paso, but those were relatively small amounts.

Q. What I mean is less water flowed down the river at El Paso after the dam was built than before it was built?

A. If you are taking the same inflow at the reservoir, that is correct.

Q. Well, assuming the same inflow?

A. Yes. The difference is the consumptive use at the two points.

Q. Which had been building up continuously—consistently, shouldn't I say, rather than continuously?

A. No. I don't believe that is correct because the consumptive uses, both beneficial and non-beneficial, between Elephant Butte and El Paso I doubt if they have changed much in the last twenty years.

Q. Well, now, wouldn't another cause of the reduced flow at El Paso be the evaporation that occurred at Caballo Lake and also at Elephant Butte?

A. Well, Caballo Reservoir has certain evaporation losses from it, which I can't give you a figure on offhand, but obviously it is a lake and it does evaporate water.

Q. And Elephant Butte does the same?

A. Elephant Butte does the same.

Q. And those figures are about the same?

A. Yes, sir. It varies with the amount of water in them.

Q. Doesn't it depend upon the area of the surface exposed?

A. It depends on the area of the surface and the condition of the channel above the reservoir.

Q. I am sure you have taken that into consideration in many of your calculations. Would you tell us what that amounts to, that evaporation?

A. From those reservoirs?

Q. Yes, sir.

A. I have figures but not with me, and I hesitate to try to do them from memory. I can give you in round numbers.

Q. Just round numbers is what I'd like to have?

A. Well, the net loss by evaporation in excess of the losses which occur otherwise in the same area, as I recall the figure, it is somewhere between five and—about five acre feet per acre of surface area. Now, the area, of course, varies tremendously from year to year. In recent years it has been very small because the lake has been almost dry, but I think the average evaporation is somewhere in the order of two hundred thousand acre feet per year. That is my best recollection.

Q. Is that true for Caballo and Elephant Butte?

A. Yes, sir. That is present storage.

Q. Are you familiar with the nature of the bottom of that lake at Caballo? Does it hold water without seeping? I mean, isn't it a known fact that Caballo leaks badly and there is a lot of loss of water up there that is stored in Caballo Dam?

A. Not to my knowledge, Mr. Grambling.

Q. Well, you know when that Caballo Dam was built up there, that there was talk about the fact that it would be for flood control? Did you ever hear of that discussion?

A. Yes, sir. I know it was built in part for flood control.

Q Well, its true purpose was to build a power dam up there, wasn't it?

A. No. I don't believe that is a correct statement.

Q. Don't you think that the building of Caballo Dam has been disadvantageous to the farmers in that it has reduced the amount of water they get rather than increase it?

A. Well, that, of course, is a matter of opinion.

Q. Well, I am asking you your opinion. I have high regard for it and I'd like to know what you think about it?

A. I think perhaps over a long period of years it might be a standoff. During the series of dry years the effect has been to slightly reduce the supply of water to the Project. In the series of wet years, with the high tributary inflows below Elephant Butte, it can probably result in some gain.

Q. Well, then, would you say we had a loss since 1942? Would that be a fair statement?

A. Well, since '42 and '43 it probably has resulted in diminishing slightly.

Q. Of course, that resulted from the fact that there is more evaporation in Caballo Dam than the amount of water that flows in there, that it holds?

A. Well, the combined evaporation as you take it out of Butte and put it in Caballo, of course, your combined area is greater than the area in a single reservoir.

Q. Kind of paying compound interest?

A. If one has the money with which to pay the interest.

Mr. Grambling:

That is all, Mr. Hill.

On Re-Direct Examination.

Questions by Mr. Edwards:

Q. Mr. Hill, the building of Caballo Reservoir enabled the Government to generate power the year around instead of just during the irrigation season, didn't it?

A. Yes, sir. That is one of the purposes of the reservoir.

Q. And also, of course, it is beneficial to the farmers to have the water behind the dams where they could release it as needed rather than have it run off down the river when it was in flood stages?

A. Yes. In 1941 and again in 1942, particularly in 1942, the total amount of water available in Project storage for use in the Project in New Mexico and Texas was greater than the total capacity of Elephant Butte Reservoir; and, of course, the capacity of Caballo; there was some roughly 350,000 acre feet more water available to enter the drought than there would have been if Caballo would not have been built.

Mr. Edwards:

That is all.

On Re-Cross Examination.

Questions by Mr. Grambling:

Q. Are they generating power out there now, Mr. Hill?

A. I don't know. I rather doubt it. Elephant Butte is almost empty.

Q. This part of the year they are not generating? Mr. Edwards asked you about generating power the year around. They are not generating now?

A. I would doubt that they are, but I think there is a good reason for that

Q. Lack of water?

A. The fact that some people up the river intercepted the stream that might have come down otherwise.

Q. Mr. Hill, would you subscribe to the estimate that was made by Mr. Resch here yesterday in which he said that upward of five hundred thousand acre feet of water existed up the river above San Marcial.

A. Well, it is more than five hundred thousand being used. I heard his testimony.

Q. I mean acres?

A. Acres being irrigated?

Q. Yes.

A. I don't know the exact figure, but I think it is in excess of that if you include all of the lands in Southern Colorado. There's not that much land in New Mexico.

Q. You have to go into Southern Colorado?

A. Yes.

Mr. Grambling:

That is all.

Questions by the Court:

Q. Let me ask you now about this Exhibit Number 151. What does the curve add to the interpretation of that?

A. The curve on the exhibit, as I said, Your Honor, is what we call technically an envelope curve, and is the outer limit of all the points that were plotted, based on historical data, so what the curve shows, assuming that the conditions of the past would prevail today, if it were not for the construction of the Elephant Butte Dam and the Project; when you start, say from 500, a year in which the flow at San Marcial was 500,000 acre feet, and you follow that line vertically to the curve, it indicates that historically there was at least one hundred days in which the flow at El Paso did not exceed ten cubic feet per second, from which one may conclude properly that under the same conditions there would be at least one hundred days if that flow of 500,000 occurred without Elephant Butte Reservoir or the Rio Grande Project in operation. Now, it doesn't say that there is only one hundred. This being an envelope this may be one hundred or anything on up, as for example, in the year 1900, for practically speaking 500,000 acre feet runoff at San Marcial there were 225 days in which the flow at El Paso was nominal, so that it was never less than a hundred historically, and historically it did go as high as 225, so the curve in effect is the minimum that could be expected. The deficiency would be over a longer period of time but not logically over a lesser period of time.

Q. 1900 and 1913 come on about the same vertical line?

A. Yes. The difference would be that the same volume may have occurred—and it would show on the previous exhibit—the same volume of 500,000 would have occurred in the same period of time and gone down the river in a large flood and gone down the valley and wasted beyond Fort Quitman; while in 1913 the same volume probably occurred in a series of floods or floods of lesser magnitudes, so that it maintains the same flows over El Paso for a longer period of time in El Paso than for 1900.

Q Again, why was it you didn't use circles for the years beginning with and coming forward from 1946?

A. The circles are the years of record in which the position of the envelope curve is determined. Those are the years before Elephant Butte Dam is known to have been built The other points are merely points to aid in reading the diagram. For example, 1947, which is near 1913, is not a point used to define a curve. It is a reading up from the bottom, and intersection with the curve, and then horizontally to indicate the number of days. That is why I show on the other side the same number I repeat myself, perhaps, but the circles represent the years of record and the check marks on the lower side of the curve are readings from that curve to predict what would have happened in recent years if Elephant Butte Dam or the Rio Grande Project had not been in operation.

Q. One other thing. Why is it that you use the standard of acre-feet for the San Marcial part of the diagram and feet-per-second for the other?

A. Well, acre-feet is the measure of volume. Second-feet, or "cubic-feet-per-second", sometimes abbreviated to "second-feet"—in British countries abbreviated "cu-sec"—that is the measure of rate of flow; so we are comparing in this diagram the volume, the total volume of discharge during the year,

with a period of time in which there was a given rate of flow at El Paso. In other words, acre-feet is volume and second-feet are rate.

Mr. Edwards:
I want to ask one additional question.

The Court:
All right.

On Re-Direct Examination.

Questions by Mr. Edwards:

Q. Would you give us some idea about how much ten cubic feet per second would amount to? You spoke of it as being nominal.

A. It would be a stream as wide as your table a foot deep and moving as rapidly as a man would walk in a normal pace. In other words, it is a very small stream, which if taken delivered into a parcel of land might serve four or five hundred acres, perhaps a little more in some areas, but in this area perhaps four or five hundred acres. It is equivalent, in other unit, to about seven million gallons daily. In other words, it is a small amount of water. It is an amount of water which I think the practice on this Project is to deliver what they call "irrigation heads", where a farmer gets five cubic feet per second, and I think that is the custom—Mr. Resch can correct me if I am wrong—but I think that is the custom, and this would be what the farmers call two head of water. It is a very nominal amount of water considering the large area of the Project or the City of El Paso with its large requirements.

Q. You mean to say that when ten cubic feet per second would take care of approximately four hundred acres, you mean a constant flow of that amount throughout the entire irrigation season?

A. No. If you had that flow constantly for that many acres you would have more water than could be applied beneficially for that land, but during the period of irrigation the general rate in this valley and climatic conditions similar to this is about one cubic foot per second to fifty acres. That is the normal relationship. So if you had ten cubic feet per second available for delivery to land it would serve about five hundred acres.

Q. For that delivery?

A. Yes. You wouldn't do it all the time because that would amount to in a year to 7,250 acre-feet, approximately, and you put that on five hundred acres and you would have a little too much water for good health.

Mr. Edwards:

That is all.

On Re-Cross Examination.

Questions by Mr. Gramblin.g:

Q. Then, Mr. Hill, if the amount of water that the City has been taking out there for its treatment plan is approximately 8,000 acre feet, why, it would be approximately the same as this ten cubic feet per second that you are talking about?

A That would be roughly—you mean 8,000 acre feet in a year?

Q. Yes, sir.

A. That's about eleven cubic feet per second average.

Q. And that is the smallest average measurement you made, you didn't go lower than that?

A. Well, I went to zero.

Q. But on your chart there?

A. I used ten as being a bottom figure. I selected ten because it had some relation to your eight thousand. It is insignificant when applied to irrigating a hundred thousand acres.

Mr. Grambling:

That is all.

Questions by the Court:

Q. Do you have this Exhibit Number 150 there?

A. Yes, sir. I have it.

Q. Let me get a little more light on that, as to the years 1909, 1910 and 1911. I am not clear about the significance of the lines there. They seem to be in fragments. What is the significance of that, anyway?

A. Well, in the year 1909, for example, reading the upper part of the diagram for a moment, Your Honor, the one that is marked "San Marcial Station"—

Q. Yes.

A. —if you follow the jagged line that goes across the diagram, the flow of the Rio Grande at San Marcial was between five hundred and one thousand cubic feet per second until the 6th day of March; then it stepped up to a little over a thousand, that would be for two days; dropped down, and then went along rising and falling until a little after the middle of April. Then it began to increase rapidly, which the river customarily does because of the snow melting on the mountains, until it reached 2500, and this was

shown like this because the purpose of this was to compare low flows and the large flows were of no particular significance. And so it was above 2500.

Q. For several days?

A. For several days. Then for one day it dropped down to 2300, at the bottom of that little mark, and then it went above 2500 again until the last day of June.

Q. That is practically two months?

A. Yes, sir. That is two months, which is quite characteristic of the river in wet years because the river is increased by the snows in the mountains in Northern New Mexico and Southern Colorado. Then, commencing early in July—in fact, the first day of July—the river dropped below 2500, and then dropped progressively, except for two minor storms coming in which would be due to local storms, local summer rains in the Albuquerque area, until in the second day of August it went practically dry at San Marcial. Then it picked up, and between the 20th and 25th of August, two days in which there was, which I know from past study of the river, a local storm, probably from one of the streams in that area, in which the flow was above 2500. Then it came down, staying around 1500 until the 5th day of September. Then for sixteen days there were flows in the river at San Marcial in excess of 2500 cubic feet per second. Then for the balance of the year you can read it correctly. Then the same is true in El Paso in the year 1909. The flow came along averaging less than five hundred cubic feet per second, with the exception of one day, until the 10th of March; then went up to a little more than a thousand; then dropped back again until it was down to approximately fifty; from the 9th of April when it picked up a little and dropped off, then

due to the flood which reached San Marcial along about the 18th or 19th of April the river at El Paso began to increase rapidly around the 22nd or 23rd of April, which is approximately the time of transit in the two hundred miles, and went above 2500 cubic feet per second for five days; then dropped below for ten days, then went above again on the 9th of May and stayed above until the 6th of June Then for a few days it dropped below 2500. Then again it went above and stayed above until the 29th, through the 29th of June, and on the 30th of June it was below 2500. In other words, on the 1st day of July, for example, reading from the upper curve, the flow at San Marcial was 2250 on the average, and it was just a little over 2000 at El Paso. Then the river decreased rapidly at El Paso and became dry, or at least so near dry that it couldn't be plotted on this graph, on the 27th of July, and remained that way until the 21st of August.

The Court:
Yes. That covers the explanation I had in mind. Any more questions?

Mr. Edwards:
That is all.

Mr. Grambling:
That is all.

(Witness excused.)

Exhibit (not marked)—Portion of Treaty between the United States and Mexico, signed on 2/3/44:

Exhibit P-151(a)—Contract between United States of America and El Paso Electric Company, dated 5/26/32;

—Extract from Minutes of Special Meeting of the Board of Directors of the El Paso County Water Improvement District No. 1, held on 4/15/32;

—Extract from Minutes of Regular Meeting of the Board of Directors of the Elephant Butte Irrigation District held on 4/5/32;

—El Paso Electric Company (Texas) Transcript from Records of Board of Directors;

Omitted from the Printed Record, pursuant to Designations of Counsel as to Printing Record, copied at pages 1 et seq.

* * * * * * * *

SPENCER L. BAIRD, a witness for the Plaintiffs, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Scott:

Q. Please state your name.

A. Spencer L. Baird.

Q. Do you live here in El Paso, Mr. Baird?

A. Yes, sir.

Q. Are you the attorney for the American Section of the International Boundary and Water Commission?

A. Yes, sir.

Q. That is the Commission provided for in the Treaty between the United States of America and the Republic of Mexico that was proclaimed by the President of the United States on November 27, 1945, portions of which were read into the record a moment ago?

A. Yes, sir.

Q. Mr. Baird, are you as attorney for the American Section of the Commission familiar with the records of the Commission so far as they pertain to the construction of Falcon Dam on the Rio Grande?

A. Well familiar with them, yes, sir.

Q. In connection with the construction of the dam, the reservoir, or any of the appurtenant works, did the United States make application to the Board of Water Engineers of the State of Texas for a permit of any kind to construct the dam or the reservoir, or to impound water or to divert water?

A. To the best of my knowledge, sir, no.

Q. To the best of your knowledge, and do the records of your office indicate that any such application was filed?

A. No, sir.

Mr. Grambling:

We believe that the records are the best evidence. I am willing to let him testify as to what he knows, but if he is going to testify about records I think the records are the best evidence.

Q Are there any records in your office showing that such an application was filed with the Texas Board of Water Engineers?

A. No, sir.

Q. One further question. Mr. Baird, is that project if you may call it such, a reclamation project under the laws of the United States?

A. No, sir, Mr. Scott, it is a Treaty project.

Q. The Bureau of Reclamation of the United States Government had nothing whatever to do with the construction of the dam, the reservoir, and had nothing to do with the maintenance or operation of it, is that correct?

A. Yes, sir. The project is wholly international, a joint international project between the United States and Mexico carried on by the two Sections of the Commission under the Treaty of 1944. You mentioned 1945 but I think that's the date when it was proclaimed.

Q. Yes, sir, that is the date of proclamation?

A. Yes, sir.

Mr. Scott:

That's all. Take the witness.

On Cross Examination.

Questions by Mr. Grambling:

Q. Mr. Baird, did the International Boundary Commission seek to appropriate any waters at the Falcon Dam?

A. No, sir.

Q. Well, the only time you need a permit is when they seek to do that, isn't it?

A. I am sure I wouldn't know about that.

Q. Well, are you familiar with the Senate Resolution approving this Mexican Treaty and Protocol?

A. Yes, sir.

Q. I would like to ask you what your interpretation is of this paragraph (c), which I offer in evidence at this time, on Page 76 of the Senate Resolution approving the Treaty and the Protocol: (reads) "That nothing contained in thetreaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States."

A. I am quite sure that I can state what the policy of the American Section has been, and it has been that the distribution and use of the United States share of the Treaty water is a matter of home rule under the laws of the State of Texas.

Q. That has been the law all along as you understand, just as you outlined it there?

A. I understand that even without the Senate Resolution perhaps that the Treaty powers may not go beyond that point.

Q. In other words, when it comes down to the distribution and use of water within the State of Texas they have to go to State authorities to get the right to use it?

A. We do not purport in any way to determine what claimant in the State of Texas might be entitled to the use of the United States' share of water.

Q. And you don't know of any reason why that rule shouldn't apply to water here in the Rio Grande or this irrigation project located in the State of Texas, do you?

A. I think that the Treaty has to do with the Boundary Section segment of the river between Fort Quitman and the Gulf of Mexico.

Q. You are talking about this Treaty here of 1944?

A. Yes, sir.

Q. Well, I am talking about the general rule of the United States. You were General Counsel here for the Reclamation Service before you went with the I.B.C., weren't you?

A. Yes, sir.

Q. And you know, do you not, that the general rule and the policy of the law with the Reclamation Service has always recognized that the distribution and apportionment of water was made by the State and the State only, haven't you?

A. I have known that it has been the policy of the Bureau of Reclamation under Section 8 of the Reclamation Act to conform to State Laws in the appropriation and use of waters.

Mr. Grambling:
Thank you, sir. That's all.

Mr. Scott:
That's all.

(Witness excused.)

Mr. Edwards:
Will the Court give us about fifteen minutes?

The Court:
All right.

(At this point a recess was had from 3:00 o'clock P.M. until 3:15 o'clock P.M. the same day, at which time proceedings were resumed as follows):

Mr. Edwards:
We would like to put Mr. Phillips back on the stand on a matter concerning which there was some confusion this morning.

The Court:
All right.

N. B. PHILLIPS, a witness recalled by the Plaintiffs, testified further as follows:

On Direct Examination.

Questions by Mr. Edwards:
Q. Mr. Phillips, I am handing you these bills to the City, which are designated as "Plaintiffs' Exhibits Numbers 148a, 148b, 148c and 148d". You told the Court this morning that from looking at those bills you were unable to tell whether they included any charge to the City for water which had been pumped from the river bed into the water treatment plant, but you would investigate your records in order to have a specific and definite answer on that. Have you done so?
A. Yes, sir.

Mr. Grambling:
I understood him to testify affirmatively that it did include water from the river and from the canal but he didn't know how much came out of each source. That was his testimony.

Mr. Edwards:
It was my understanding he couldn't tell from these bills whether they included it or not.

The Court:

I understood that he said he couldn't tell from the bills here that it covered both, but Mr. Grambling did ask him if he could segregate it and he said he couldn't do it.

Q. All right, Mr. Phillips, go ahead and say what your investigation disclosed as to whether or not there is any charge for river water put in those bills?

A. I would like to say that there is not included in these bills, Exhibits 148a, 148b, 148c and 148d, any charges for any water that was pumped from the City of El Paso's pumping plant on the river.

Q. And it includes only what came through Project facilities?

A. Yes, sir.

Mr. Edwards:

That is all.

On Cross Examination.

Questions by Mr. Grambling:

Q. All right, now, Mr. Phillips, let's take that first bill. This morning you were asked with reference to this bill dated November 1, 1951, for $2798.61, as to whether or not it included both water from the river and from the canal, and you said that it did include water from both. Now, upon what do you base this change in your testimony?

A. Mr. Grambling, after we had a discussion up here this morning, I apparently got a little crossed up and I thought about it afterwards. I don't think under the 1949 contract that the District could charge

the City for water that is pumped out of the river through facilities that do not belong to the Project. So I went to my office and checked the records turned over to the people who make the bills in my office during the lunch hour, and I find that no water pumped from the river was included in any of those bills.

Q. You are basing that on what they tell you?

A. No, sir. I base it on having examined the records received from Mr. Resch's office myself.

Q. Then, as I understand, now your statement is that as you understand the agreement between the City and the Bureau and the El Paso County Water Improvement District Number One the District is not entitled to charge the City for any water that it takes out of the river without using District facilities?

A. Under the contract of August 10, 1949.

Q. That is what I said, '49. I might not have the right date, but the '49 contract?

A. Yes, sir.

Q. That is the last contract that they had?

A. Yes, sir.

Q. And that is the contract that you are operating under?

A. That we are operating under?

Q. Yes. With reference to the City, I mean?

A. Yes, sir. As far as these particular bills are concerned.

Q. Then if the City had a pipe up here connecting with the American Canal, and taking water there and running it through their water treatment plant, you don't think they would be entitled to charge for that water?

A. Yes, because I think Project facilities would have been used to get it down there.

Q. Why wasn't Project facilities used to get this water down into the river?

A. They probably were.

Q. You based your statement a minute ago on the fact that no Project facilities were used. Now you tell me that Project facilities were used?

Mr. Edwards:

You are overlooking the '44 and '41 contracts.

Mr. Grambling:

So is he.

Mr. Edwards:

But you are not confining yourself to what contract you are talking about.

Q. All right. Let's start all over again. Would you tell us why you say there is no water pumped out of the river into the City's water treatment plant that is not included in those bills?

A. For the reason that it wasn't reported in the figures, that the record received from the Bureau of Reclamation substantiating these figures did not include any water pumped from the river plant.

Q. How do you know?

A. Because I examined the report.

Q. Well, is that proper, that it shouldn't? You say it shouldn't do so, is that right?

A. I think that the water that is pumped from the river during the summer months as we said—

Q. That is the irrigation season?

A. Yes. That that water probably should be charged on the allotment of water-right lands under the contracts of '41 and '44.

Q. You mean should be charged against the City?

A. Charged against the City's allotment under the contracts of '41 and '44.

Q And if they take more than two acre-feet on the lands that they hold water rights for they should pay a dollar an acre for it—I mean, a dollar an acre-foot for it?

A. Yes, sir.

Q. This morning you said you had included the irrigation season but now you say you haven't?

A. Haven't included what?

Q. In those figures there?

A. I say that these bills do not include any water that was pumped from the river plant according to the records that was furnished my office from the Bureau of Reclamation.

Q. And I believe you also said they didn't do it because they didn't use any facilities to get the water out of the river?

A. No. I said that I didn't think that under the contract of August 10, 1949, that that would be the way we would bill it in our office.

Q. Because they didn't use any facilities of the District?

A. Well, they didn't use the Franklin Canal, let's put it that way.

Q. Well, you don't think you would have billed any water that didn't come through the Franklin Canal?

A. Yes, I might have billed it but I think that the proper method was used when water that was taken out of the river into the treatment plant during the time that storage water was in the river and was charged against the allotment of the lands entitled to it under the '41 and '44 contracts is the proper one.

Q. As I understand, now your categorical state-

ment is that no water is included in these bills that was taken out of the river?

A. Yes, sir.

Q. Mr. Phillips, look at that schedule there (indicating) and see if you are still willing to tell this Court what you just testified to?

A. I don't see that this schedule has anything to do with the way I testified.

Q. Doesn't it show the percentage of water that came from the river? Doesn't it show that you did take into consideration water that came out of the river and the number of gallons?

A. No, sir. This schedule does not show that in my opinion.

Q. All right. I will get a witness on later to prove it. That is all.

Mr. Edwards:
That is all.

(Witness excused.)

Mr. Edwards:
The Plaintiffs rest

ROBERT L. LOWRY, a witness for the Defendant, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Grambling:

Q. Will you state your name to the Court, please?

A. Robert L. Lowry

Q. Mr. Lowry, where do you live?

A. Austin, Texas.

Q. And what is your business or profession?

A. I am an Engineer in private practice.

Q. What training have you had as an engineer, what collegiate education?

A. Well, I first took an academic degree back in 1922.

Q. Whereabouts?

A. At Trinity University in North Texas when it was Waxahachie.

Q. All right.

A. Later I went to the University of Texas Engineering School. There I received my B.S. in 1929.

Q. Tell us what experience you have—had since 1929?

A. Since that time I have been engaged in the field of hydraulics and hydrology of surface water practically entirely, after spending a number of years around Austin and various points in the State, in 1935 I joined the Reclamation Bureau in their Hydrologic Division, with headquarters in Denver. I stayed there four years, leaving in November of 1939. In the next three years I was withthe National Resources Planning Board as a Hydraulic Engineer, a big part of that time engaged in the investigation, so-called the Joint Investigation of the Pecos River, in which there were numerous Federal agencies participating along with the two States of Texas and New Mexico. In 1942 I came down to El Paso as one of the hydraulic engineers of the International Boundary and Water Commission. I stayed in that capacity, mostly in charge of the hydrologic studies leading up to the construction of the Falcon Reservoir, until the end of 1949, at which time I resigned and have been in

private practice since. In the time I have been in private practice I have completed some assignments in foreign countries and I am now connected as consultant or technical advisor with various agencies, one of which I am a special consultant to the City Water Board of San Antonio on surface water. I am one of the technical advisors of the International Boundary and Water Commission. I am the technical advisor to the Texas Commissioner on the Pecos River Commission. I am Chief Engineer of the Texas Water Resources Committee. I am a special consultant to the research job that is proceeding along under the Board of Water Engineers, and I do other work from time to time as the opportunity arises.

Q. Now, Mr. Lowry, have you made any investigation concerning the records and flow of water in the Rio Grande River?

A. I have looked at those records in the past six months to see what they might reflect in certain periods and at certain stations using the records of the Geological Survey and also the records of the International Boundary and Water Commission.

Q. Are those records authentic?

A. To my knowledge they are the best that are obtainable in this country or anywhere else.

(At this time an instrument was marked for identification as Defendant's Exhibit Number 3.)

Mr. Grambling:

Your Honor, we want to offer for identification Exhibit 3 at this time.

Q. Now Mr. Lowry, will you refer to Exhibit 3, Defendant's Exhibit 3 which you hold in your hand,

and advise us what that exhibit is?

A. That is a daily hydrograph of the flow of the Rio Grande at El Paso, in which the vertical scale is two thousand cubic feet per second, and in the horizontal scale is the date by years covering the 365 days of the year.

Q. Now, what year does that chart cover?

A. This exhibit is for 1904, and it picks up the flow when the river started again following a long drouth that proceeded and continued into 1904

Q. Now, it appears from that chart that the first time we had any water was in August, is that right?

A. That is right. Early in August, the river started running again. It got down very low. I can't tell from this scale just what the low figure is in September, but then late in September an appreciable flood came in which indicates a peak flow or mean daily at the height of the flood of more than 17,000 second-feet.

Q. Seventeen hundred or—

A. Seventeen thousand.

Q Second-feet?

A. Yes, sir.

Q. Where is that shown on the chart?

A. That is the high point on the chart in the middle of October.

Q. And then it dropped down, as shown here in December, to—

A. Something, it may be around four or five hundred, I guess. Three hundred and fifty, maybe.

Q. Is that second-feet?

A. That's in cubic feet per second, yes, sir.

Q. And that shows what the river was flowing around El Paso in 1904, the volume of water, is that right?

A That is right.

Mr. Grambling:
We would like to offer that exhibit in evidence.

Mr. Edwards:
No objection.

(Defendant's Exhibit No. 3 was thereupon received in evidence but same is not suitable for being copied and is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

(At this point another instrument was then marked for identification as Defendant's Exhibit No. 4.)

Q. Mr. Lowry, you have before you Defendant's Exhibit No. 4. What year does that represent?
A. That represents the flow as it passed El Paso in 1905.
Q. And what was the high point there?
A. I do not have the high point. The scale on which I was working permitted me only to show as high as 20,000 second feet.
Q. Did it go above that point?
A. There were two periods, in the middle of June and the early part of June, when the flow exceeded that, but I don't recall just what the maximum was; something in excess of twenty thousand for a period of two or three days in the first part of the month, and maybe a week in the middle of the month.
Q. Is that a flood stage?
A. Yes, sir. That was quite large for this part of the country.
Q. And when did you get the minimum runoff there?

A. The minimum flow there occurs late in August, through September and October, and apparently picks up again in November and December.

Q. How low does the flow get according to that chart?

A. That would be very hard to interpret where one inch equals two thousand second feet. That scale is so small. This same chart, that is, a chart depicting the same information, has been entered twice previously as exhibits here; once by Mr. Resch, in which the whole year was condensed to a very short space and on a smaller scale; and then recently Mr. Hill, where he showed the vertical scale much magnified to what I had shown in that he had shown up to 2500 feet to where I showed up to twenty thousand. His scale was much lower.

Mr. Grambling:
We would like to offer Defendant's Exhibit 4.

Mr. Edwards:
No objection.

(Defendant's Exhibit No. 4 was thereupon received in evidence but same is not suitable for being copied and is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

(At this point another instrument was then marked for identification as Defendant's Exhibit No. 5.)

Q. Now, Mr. Lowry, I believe you have before you Defendant's Exhibit No. 5?

A. That is right.

Q. Tell us what that is.

A. That is a similar hydrograph covering the period from January, 1906 through December, 1906.

Q. What was the maximum flow at El Paso during that year?

A That was something in excess of about 8,500 second-feet.

Q. And when did it reach a minimum flow?

A. The minimum was again reached in September, where it apparently goes dry for a day or two and then picks up again to run throughout the fall months.

Q. How much would you say it ran there through most of the fall months there?

A. Well, taking the month of October, which is somewhat lower, it might be around five or six hundred second-feet. November and December would probably average about a thousand second-feet.

Mr. Grambling:

We offer in evidence Defendant's Exhibit No. 5

Mr. Edwards:

No objection.

(Defendant's Exhibit No. 5 was thereupon received in evidence but same is not suitable for being copied and is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court

(At this point another instrument was marked for identification as Defendant's Exhibit No. 6

Q. Now, Mr. Lawry, will you refer to Defendant's Exhibit No. 6 and tell us what that is?

A. That is a daily hydrograph representing the flow as it passed El Paso in the Rio Grande in the year 1907.

Q. What was the high point during that year?

A. Oh, roughly, around 10,700 second-feet.

Q. What, apparently, was the low point?

A. The low point could have either been in March or in October and appears to be about the same, around 350 or 400 second-feet.

Q. Well, isn't that two thousand feet that first line?

A. Yes, sir.

Q. Isn't it about a third of that way up there?

A. Well, I wouldn't estimate it quite that high. It is just a matter of estimating. I haven't the scale to put on it.

Q. Well, it is something in the neighborhood of five hundred feet, isn't it?

A. Well, it could be as much as five hundred

Q. Was that a pretty thoroughly wet year?

A. It would be indicated by this hydrograph that this was a wet year. I think

Mr. Grambling:

We offer Defendant's Exhibit No. 6 in evidence.

Mr. Edwards:

No objection.

(Admitted in evidence and is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

(At this point another instrument was marked for identification as Defendant's Exhibit No. 7.)

Q. Now you have Exhibit No. 7 before you, Mr Lowry. Is that a hydrograph for the year 1908?

A. Yes, sir. That is a similar hydrograph representing the flow as it passed El Paso in the Rio Grande for the year 1908.

Q. Does it show that the water pretty well played out of El Paso there?

A. For the middle of the summer it seems to fade out entirely, it looks like zero the middle of July, and then there was some flow for a period of roughly two months, then about a period of two months when there was no flow, again picking up about the middle of November and continuing to the end of the year.

Q. That appeared to be one of the dry years?

A. That would be very definitely one of the dry years.

Mr. Grambling:

We offer Defendant's Exhibit No. 7 in evidence.

Mr. Edwards:

No objection.

("D-7" was admitted in evidence and is to be transmitted as an original exhibit to the Appeals Court under order of the trial Court.)

(Another instrument was then marked for identification as Defendant's Exhibit No. 8.)

Q. Mr. Lowry, I believe you have before you Exhibit No. 8. That is the same information, is it not, for the year 1909?

A. That is right.

Q. Does it show that the river didn't flow any at El Paso during part of that time?

A. Yes, sir. There was a low flow close to zero early in March. Then there was a good water supply for a period of about three months. Then it seemed to play out toward the end of July, and the latter part of August the flow picked up again and continued through the remainder of the year.

Mr. Grambling:
We offer in evidence Defendant's Exhibit No. 8.

Mr. Edwards:
No objection.

("D-8" was admitted in evidence and same is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

(Another instrument was then marked for identification as Defendant's Exhibit No. 9.)

Q. Now you have before you Exhibit No. 9, I believe, Mr. Lowry, for the year 1910. That shows the same character of information that is shown on the other exhibits, is that right?

A. That is right.

Q. When was the maximum flow by El Paso?

A. Oh, about the end of the first week in May the flow got up to something above 7500 second-feet. Then it diminished rapidly and by early in July the river was dry and continued dry until the early part of December and the flow never increased very greatly at that time. That was definitely another dry year.

Q. There were five months then, when the river was practically dry, is that correct?

A. That is right.

Mr. Grambling:
We offer in evidence Defendant's Exhibit No. 9.

Mr. Edwards:
No objection.

("D-9" was admitted in evidence and same is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

(Another instrument was then marked for identification as Defendant's Exhibit No. 10.)

Q. Mr. Lowry, you have before you Exhibit No. 10. That shows the same information that these other charts show except for the year 1911 instead of other years?

A That is right.

Q. What is the maximum flow by El Paso during that year?

A. Something around I would say 11,700 second-feet.

Q. What time of the year?

A. That occurred about the middle or the end of the second week of October.

Q. Did you have any dry period there?

A. Yes, sir, immediately preceding that, in the latter part of August and maybe the first of September, the river had been dry.

Q. And then after that there was no further dry periods?

A. After the larger flood inflow, why, the river sustained its flow through the remainder of the year.

Mr. Grambling:
We offer in evidence Defendant's Exhibit No. 10.

Mr. Edwards:
All right.

("D-10" was admitted in evidence and same is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

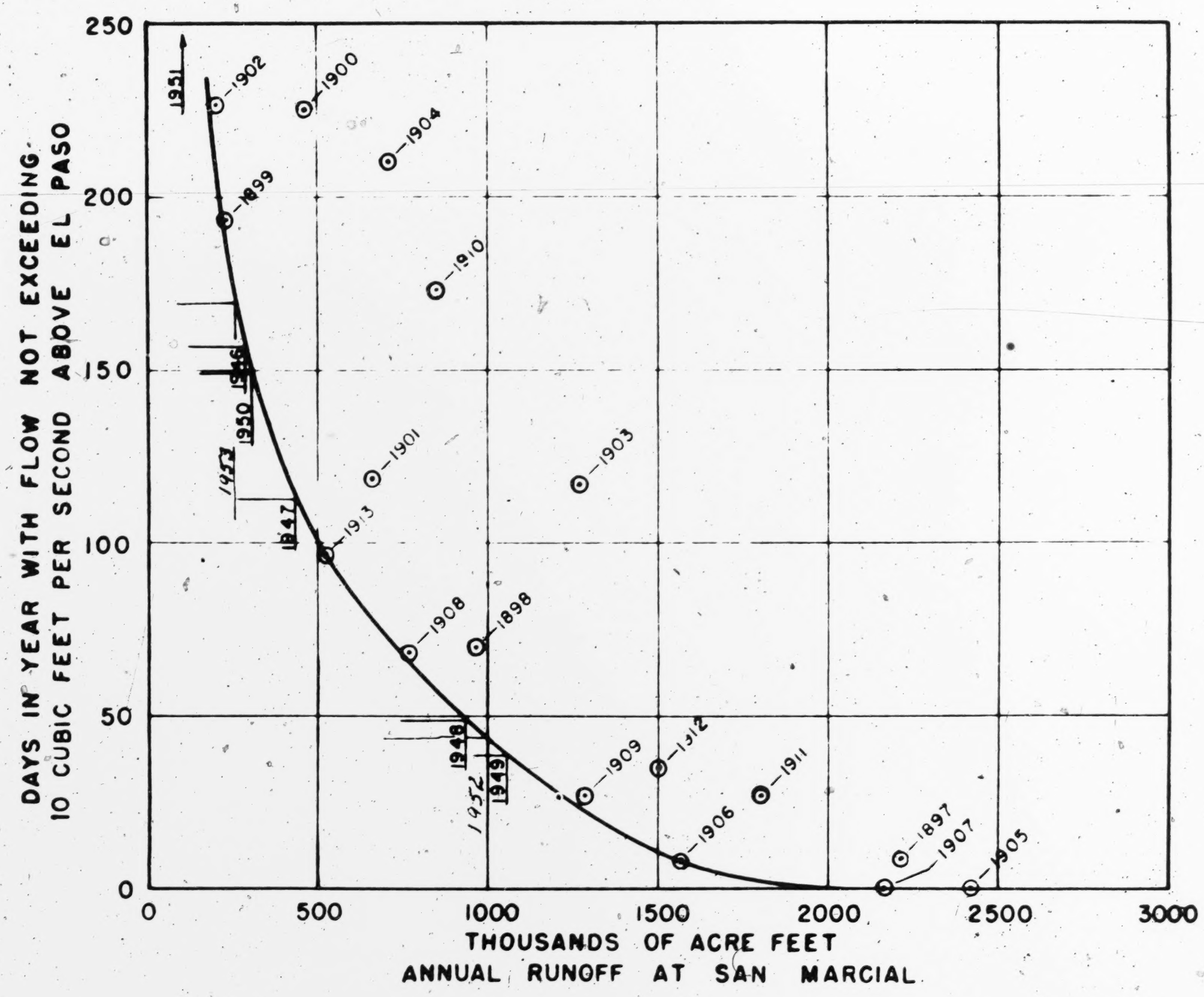
(Another instrument was then marked for identification as Defendant's Exhibit No. 11.)

Q. Mr. Lowry, you have Exhibit No. 11 before you which is for the year 1912, is it not?
A. That is right.
Q. And shows the same information or same character of information that you have shown for the preceding years?
A. That is right.
Q. What is the highest point in the river and when did it happen?
A. I would say around fifteen thousand two or three hundred second-feet and was the result of a flood which started early in May and continued through the first half of July.
Q. What is that due to, the runoff from the snow?
A. Yes, sir. That is probably your snow runoff from the high mountains.
Q. Did you have any dry period in that year?
A. Yes, sir. In spite of that large flood in the early summer the river went dry in the first part of August and again in September and it stayed low all the way through October before the flow increased.

Mr. Grambling:
We offer in evidence Defendant's Exhibit No. 11.

Plaintiff's Exhibit No. 151
CA 1409
ACV

ANNUAL DISCHARGE OF RIO GRANDE AT SAN MARCIAL AND PERIODS OF LOW FLOW IN RIO GRANDE ABOVE EL PASO



1089

0's are feet of water To Treatment Plant
+ Percent of total From River

	1950		1951		1952		1953		1954		
R-		%	993.7	%	956.0	%	869.9	%	757.5	%	
C-			56.8	94.6	0	100	0	100	0	100	JAN
R-			471.1		896.1		907.4		0		
C			325.0	59.2	0	100	61.5	93.6	0	0	Feb
R-			297.6		552.4		297.2		0		
C-			956.0	23.7	0	100	823.7	26.5	78.0	0	MAR
R-			0		0		243.8		0		
C			670.0	0	227.7	0	910.0	30.2	654.9	0	Apr
R.			10.7		0		286.2		0		
C.			578.9	1.8	724.2	0	970.9	22.8	1159.8	0	May
R-	1150.4		3.2		198.4		590.6		0		
C-	18.9	98.4	970.0	0.3	953.0	17.2	876.1	40.3	1411.3	0	June
R-			22.0		29.1		396.1		0		
C-	971.7	0	1135.3	0.2	1146.7	2.4	1087.2	26.7	13322	0	July
R-			0		24.0		502.3		99.5		
C-	1212.3	0	1099.4	0	1171.4	2.0	1044.2	32.5	928.9	9.7	Aug
R-	19.5		0		227.3		72.7		213.9		
C-	830.2	2.3	1144.3	0	931.5	19.6	662.2	9.9	390.1	35.4	Sept
R-	820.1		0		585.0		380.8				
C-	194.3	80.8	949.9	0	233.7	71.5	603.8	38.7			Oct.
R-	352.6		0		465.3		586.9				
C	534.6	40.1	554.5	0	163.3	74.0	431.8	57.6			Nov.
R-	372.2		0		41.2		119.2				
C-	662.2	36.0	818.0	0	31.7	52.5	685.9	14.8			Dec

"D-29"

D-29
CA1409
MCV

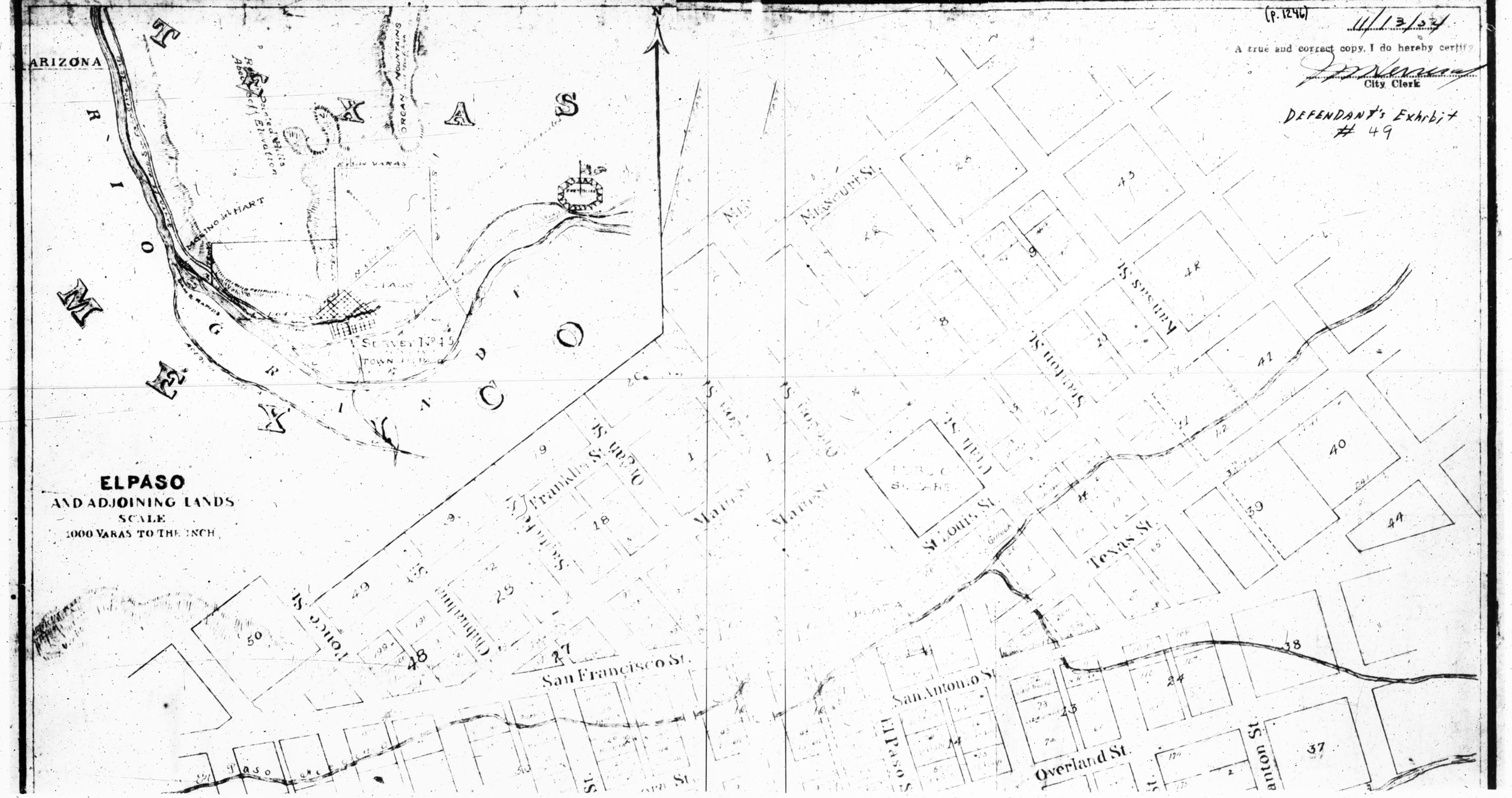
(p. 1246)

11/13/54

A true and correct copy, I do hereby certify

City Clerk

DEFENDANT's Exhibit
49



1169

N

SANTA FE
BRIDGE

A. C. VALENZUELA

"D" 30"

PLAT
TOWN
Durango St.
Chihuahua St.
Sonora St.
Santa Fe St.
Santa Fe St.
Oregon St.
Utah St.
Stanton
Overland St.
Overland St.
Leon St.
EXPLANATION
200 FEET TO THE INCH
PROPERTY SOLD AND IMPROVED
BEFORE THE TOWN WAS LAID OFF
INDICATED BY BROKEN LINES.

Mr Edwards:
No objection.

("D-11" was admitted in evidence and same is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

(Another instrument was then marked for identification as Defendant's Exhibit No. 12.)

Q. Mr. Lowry, you have before you Exhibit 12. What does that relate to?

A. That shows the flow at El Paso in the Rio Grande during the year of 1913.

Q. What does it show the maximum flow was?

A. Slightly less than four thousand second-feet in the middle of June, and then it dried up in the middle of July and was apparently dry the remainder of the year.

Q. About six months there when the river was dry?

A. Yes, sir.

Q. Does that indicate to you that there was a very small runoff from the mountains?

A. Yes, sir. In that year there was a very low runoff from the mountains. This is very definitely a low flow at the time that the snow would melt and would usually be coming down.

Mr. Grambling:
We offer in evidence Defendant's Exhibit No. 12.

Mr. Edwards:
No objection.

("D-12" was admitted in evidence and same is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

A. I would like the record to be correct, and if I have omitted it I would like the record to show that there is some flow at the end of the year.

(Another instrument was then marked for identification as Defendant's Exhibit No. 13.)

Q. Now, Mr. Lowry, you have before you Exhibit No. 13, is that right?

A. Yes, sir.

Q. What does this exhibit show?

A. This exhibit shows the annual total discharge of the Rio Grande at El Paso for each of the years from the period about 1889, when the record first began, through 1951.

Q. Well, now, I notice you have in the middle of the page here "Annual Discharge Rio Grande at El Paso", and on the left you have "Annual Runoff in 1000 Acre-Feet." What is the difference between the two.

A. They are synonymous in this case, they are interchangeable terms, "runoff" or "discharge", both reflect the flow of a stream.

Q. Well, then, what this exhibit shows, if I understand you right—if I am wrong please correct me—is the annual runoff in thousand acre-feet at El Paso during each of the years indicated?

A. That is right. I want to call attention to the period that was shown by the separate hydrographs showing the discharge daily from 1904 through 1913, but in that period of ten years the average annual flow was quite high and that was the period during which the negotiations were underway for the development of the Elephant Butte Reservoir. In other words, most of that time, in spite of the dry periods,

there was a good deal of flow passed by El Paso and the average for that period was far higher than for any period since that time for any similar period.

Q. Now, the first year is 1889, is that right?

A. That is right.

Q. Does that show five thousand acre-feet?

A. Well, approximately about 4,900 acre-feet.

Q. Those figures you have in your hand are what you made these charts from, are they not?

A. That is right.

Q. And I believe you said these figures were obtained from the International Boundary Commission or United States Geological Survey?

A. The first part of them were obtained—part of them were obtained from the records of the Geological Survey and others from the International Boundary Commission.

Q. Now, the first year, 1889, what does that show? That is the runoff per year by El Paso, is that right?

A. That is right. It shows 491,000 acre-feet.

Q. What does it show in 1891?

A. In 1891, there was quite a large figure, 1,921,400.

Q. What is the capacity of the Elephant Butte Dam?

A. It has been given in testimony previously here, I believe, as two million one hundred thousand acre-feet at the present time.

Q. There was almost enough water that flowed into El Paso to fill Elephant Butte Dam that year, is that correct?

A. That is correct. Probably ten percent of the full amount.

Q. Then it drops down, does it not?

A. Yes, sir. You run into the drought period.

Q. How low does it get in 1896?

A. Less than 300,000 acre-feet. It is about 295,000.

Q. Then it goes up to about more than 1,300,000?

A. That is right, 1,361,100.

Q. In '97?

A. That was in '97. Then it drops down again to more or less the medium figure of 669,500 in '98, and then drops down to a very low figure of 78,200 in 1899.

Q. And in 1902 it even gets lower than that?

A. That is right. That seems to be the lowest of record, 50,700.

Q. Then in 1905, that is a high year, isn't it?

A. Yes, sir.

Q. How high does that go?

A. That goes over two million, eleven thousand, eight hundred.

Q. That would be practically enough water to fill Elephant Butte Dam that year that ran by El Paso?

A. Yes, sir.

Q. Now, without taking all these years up, you are showing clear down to 1951, and in 1951 you show that the runoff by El Paso was how much?

A. About 252,000. Since then it has decreased but I don't have the figures.

Q. Now, you are talking about the runoff in El Paso. You mean runoff including the water that is released by the Reclamation from the Dam?

A. Yes, sir. That is all the water that passed El Paso at the gauging station which is West of the City here.

Q. Well, it could be some flood water?

A. Well, it includes all waters from whatever source.

Q. According to the testimony in this case, the dam started to function in 1916, and fully in 1916. Now, I notice in 1951, the amount of water was how much by El Paso?

A. 731,300.
Q. And in 1916 it dropped down to what?
A. 555,800.
Q. And in 1918?
A. It was 349,100.
Q. In 1922 it went back up to how much?
A. 778,700.
Q. And then it dropped down gradually until 1940, didn't it?
A. Yes, sir. Seems to be a gradual decline there.
Q. What was it in 1940?
A. 453,900 acre-feet.
Q. And '42 is the year that the spillway ran over, isn't it?
A. That is right.
Q. And that showed how much?
A. 1,559,200.
Q. And from then it dropped sharply in 1943, did it?
A. Yes, sir. It has been steadily decreasing since that time.
Q. Until '51, it got down to about 250,000?
A. About 250,000.

Mr. Grambling:
We offer in evidence Defendant's Exhibit No. 13.

Mr. Edwards:
I just want to ask one question. Is that water year or calendar year?

The Witness:
Calendar year.

Mr. Edwards:
All right.

("D-13" was admitted in evidence and same is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

(At this point an instrument consisting of two sheets was marked for identification as Defendant's Exhibit No. 14.)

Mr. Grambling:
I would like to offer in evidence Defendant's Exhibit No. 14.

(Same was admitted in evidence but also is not suitable for being copied and is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

Q. Now, Mr. Lowry—
A I would like to comment on those figures, if I might, (referring to Exhibit "D-14").
Q. All right.
A. The question has been asked during the testimony here several times as to what the average flow of the Rio Grande at El Paso was from 1889 up to 1915 as compared with what the flow has been since Elephant Butte went into operation, and those two sheets there happen to break at that point, and I did extract the average figures, just the average annual figure for each of those periods; and my computations indicate that the period from 1889 through 1915 averaged about 830,000 acre-feet at El Paso while the figure for the period since Elephant Butte went into operation—as I remember it, you can correct me if I am wrong—1916 to and through 1951, as shown by those records, I think was 594,000 acre-feet, or some-

thing like 230,000 acre-feet per year less than passed El Paso in the earlier period.

Mr. Edwards:
What was your first figure?

The Witness:
830,000 for the first period of twenty-seven years, and 594,000 for the last thirty-six years.

By Mr. Grambling:
Q. That's about 260,000 acre-feet per year less?
A. 236,000.

(Another instrument was then marked for identification as Defendant's Exhibit No. 15.)

Q. Mr. Lowry, I next direct your attention to Exhibit No. 15. Will you explain to us what that exhibit is?
A. This exhibit shows the releases by the solid lines on an annual basis that were made from Elephant Butte Reservoir, which started into operation or started making releases in 1915, we might say, and this chart goes through again 1951, which were the last figures I had available at that time.
Q. Now, what is the purpose of this chart, Mr. Lowry?
A. I wanted to find out how the flow there compared in the early period with the latter period, and if anything, there is a slight decline in the flow of the releases from Elephant Butte from the early period down to the later period.
Q. The heavy line is the Elephant Butte release?
A. That is right.

Q. And the dotted line is the Caballo release?

A. Now, starting in 1938, when the Caballo Reservoir was completed, the dotted line or dashed line shows the releases made from that point just for the irrigation below. In other words, the releases above that line, for the solid line, for that period may have been altered by releases for power.

Q. Now, I notice in 1942 that there was almost a million eight hundred acre-feet released from Caballo?

A. That is right.

Q. Was that on account of the flood condition?

A. That is right. That was water that they were unable to hold. That is the one time in the period since Elephant Butte was completed or constructed in which there has been any spilled water.

Q. Well, at that time Caballo didn't hold it, did it?

A. No, sir. It showed here that there was released almost as much as was released from the reservoir above in Elephant Butte.

Q. Now, getting back to 1951, which is the last year, you show approximately 420,000 acre-feet, is that right?

A. That is right.

Q. And you show a release from Caballo of approximately 70,000 acre-feet, don't you?

A. Yes, sir.

Q. In other words, Caballo released more?

A. Yes, sir. They were emptying Caballo because water was beginning to get scarce in Elephant Butte at the time.

Mr. Grambling:

We offer in evidence Defendant's Exhibit No. 15.

Mr. Edwards:
No objection.

("D-15" was thereupon admitted in evidence and is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

(Another instrument was then marked for identification as Defendant's Exhibit No. 16.)

Q. Now, Mr. Lowry, you have before you Exhibit No. 16, I believe?

A. Yes, sir.

Q. What is that?

A. This chart shows two things. It shows the City Sewer Outfall back to the Rio Grande for the period from 1939 and through September, 1954; and then, super-imposed on that and cross-hatched to distinguish it from the other, is the diversions by the City from the Rio Grande starting with November, 1943 and also carried through September, 1954.

Q. Well, now, it appears that from 1939 up until practically the end of 1943 there was no diversion by the City from the Rio Grande, is that right?

A. That is apparently right. The first record that I find for diversion by the City begins in November, 1943.

Q. And that amount was comparatively small?

A. Yes, sir, during that year, those being winter months it would normally be small, anyhow.

Q. Now, in 1942 what was the sewage outfall?

A. Well, it is shown by months and it varied from about 860 to as high as a thousand acre-feet per month.

Q. Per month?

A. Yes, sir. Each of those short horizontal lines represents one month.

Q. You couldn't just look at that and tell how much the average was for that year, could you?

A. Well, I would say it was something around nine twenty, would be the average, that times twelve would be roughly around ten thousand acre-feet.

Q. Now, in '44 the effluent or sewage outfall to the Rio Grande was considerable more than the diversions for the City, wasn't it?

A. That is right. The cross-hatched area in the bottom part of that column representing 1944 is far smaller than the volume under the main hydrograph which represents the sewer outfall to the Rio Grande. That is substantially above it all the way through the year.

Q. Now, in 1950, what is the condition?

A. Well, in 1950, there are about four months during the year in which the diversions by the City exceeded the returns by the City from the sewage outfall. During the remaining eight months the sewage was greater, and the overall for the year is far greater due to the fact that in two months and nearly three at the beginning of the year there were no diversions at all.

Q. How about '51?

A. The diversions by the City during that year were lower during each month than was returned to the river by the sewage outfall east of town.

Q. How about '52?

A. That same thing may be said of '52.

Q. And how about '53?

A. '53 shows a period, looks like seven months, during the year, in which the diversions exceeded the return. During the other five months, however, the

returns of sewage were great enough to more than offset the diversions, or these larger diversions, so that the overall result for the year was that there was still a little more water returned to the river than was taken out by the City.

Q. How about '54 as far as your map goes?

A. Well, in '54 there is only one month in which the rate of diversion exceeded the rate turned in or returned to the river in sewage, and in all the rest of the months, why, the sewage return has been greater.

Q. Where is that sewage return to the river, Mr. Lowry?

A. It is East of town. It has been a number of years since I was out there. It is somewhere out there just East of Cordova Island. I can't give you the exact location or street names or numbers, or anything.

Q. Well, is that sewage treated before it is put into the river?

A. Yes, sir.

Q. Is it usable for irrigation purposes?

A. Yes, sir. It seems to be very desirable for there are a number of cities that make contracts for all of their sewage effluent.

Q. It is not an unusual thing, then, for a city to make disposition of its sewage effluent?

A. No, sir. With water being worth more and more, why, more and more cities are making use of it.

Q. Do you know whether or not any of the cities in Europe depend entirely on that for their water supply?

A. Well, that would be just something that I might have heard. I can't remember reading anything

directly on that, although the Rhine is supposed to have been used over and over again throughout its course. I have heard about that one.

Mr. Grambling:

We offer in evidence Defendant's Exhibit No. 16.

(Admitted—to be sent as original.)

A. I would like to add that the source of this information is from the records of the International Boundary Commission.

Q. I understood all that was from the United States International Boundary Commission or the United States Geological Survey, all these exhibits?

A. That is right, up to this time. This happens to be all from the International Boundary Commission.

Q. That is No. 16?

A. Yes, sir. The bulletins have only been published through 1951, and it is from preliminary data since that time.

(At this point another instrument was marked for identification as Defendant's Exhibit No. 17.)

Q. Mr. Lowry, you have before you Exhibit No. 17. What is that exhibit?

A. This exhibit shows by years from 1880 through 1951 the total acreage irrigated from the Rio Grande above El Paso. It is divided into two parts. The dash line is plotted from 1880 through 1936 from the records that appear in the Rio Grande Joint Investigation, which I think was Exhibit No. 1 of Plaintiff in this case, and since 1936 they have been taken from the records as obtained by the International Boundary

and Water Commission and published in the bulletins.

Q. That is the dotted line?

A. That is the dotted line.

Q. All right.

A. Now, the line above that, the data are much more fragmentary concerning it because there is no continuous record of irrigated areas for that period. We do have pretty fair records toward the end of the period but they are just spot measurements before that, and they are also published in the Report of the Rio Grande Joint Investigation mentioned as Exhibit 1. Now, in between those periods when these were published, I have just made interpolations which may or may not be good; but the things I wanted to show is the large increase in the period from 1880 up to about 1927, where apparently something in the excess of a million acres were irrigated above El Paso on the Rio Grande.

Q. Is that above San Marcial or just above El Paso?

A. That includes the area in the so-called irrigation project above El Paso. It includes that part of the El Paso County Water Improvement District Number One that is above El Paso. In other words, this is the total acreage above El Paso that is grouped under this figure that is shown here.

Q. Now, the dotted line relates to irrigation in the San Luis Valley in Colorado?

A. That is right.

Q. Where is that located?

A. That is in the Southern part of Colorado.

Q. What towns are in that valley?

A. Well. Alamosa is probably the largest town. San Luis is a small place on the East side. Del Norte is one of the towns farther down. There are

not many large towns in that area. It is principally a farming area.

Q. Your graph shows, does it not, that the acreage in irrigation in this San Luis Valley in Colorado increased from about 13,000 acres—or is that 135,000?

A. No. That's 130,000 acres.

Q. From 130,000 acres in 1880 to 780,000 acres in 1926, is that right?

A. I think that is '27, but the figure is approximately right.

Q. That is where most of the increase came from?

A. That is right. The increase in the New Mexico Valley above El Paso and up to the State line of Colorado has not been too great or it has not been in anything like the same proportion as the increase that took place in Colorado. I think history will indicate, the history of irrigation in that area, and as explained in this same report that was entered as Exhibit 1. I believe, the report on the Rio Grande Joint Investigation, that there was probably more acreage irrigated in 1927 that could be sustained by the water supply, and since then there has been a gradual decrease in that acreage, which is indicated in this chart also, but it is fairly well stabilized now.

Mr. Grambling:

We offer in evidence Defendant's Exhibit No. 17.

Mr. Edwards:

No objection.

("D-17" was thereupon received in evidence and same is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

The Court:

Now, you say the total irrigated from the Rio Grande above El Paso is super-imposed on the other?

The Witness:

No, sir. The total includes the dotted line. The difference between the dotted line and the solid line represents the area between El Paso and the Colorado State line, South Colorado State line, but the solid line represents the total acreage irrigated and the dotted line is that part of it which was in Colorado.

The Court:

All right.

(At this point an instrument was marked for identification as Defendant's Exhibit No. 18.)

Q. Mr. Lowry, you have in your hand Exhibit No. 18. Will you explain to the Court what that is?

A. That is what we call a pie diagram which shows only two elements. One of those elements is made up of the diversions, the average diversions to the American Canal.

Q. Is that the water diverted here at this point here? (Indicating on blackboard.)

A. Yes, sir. That is the water that is put into the American Canal at the American Dam.

Q. Up above El Paso there?

A. Yes, sir. And the reason I took that point is because that includes the water which may have been in the Rio Grande above that point which was released for satisfaction of the claims of Mexico, that 60,000 acre-feet which went down the river is not included in this, and that is for the period during

which the City has been diverting water from the Rio Grande for municipal use, that period being from the beginning of November, 1943 and up through September, 1954. The small wedge that is left out of that at the top is the proportion that the diversions to the City bear to the total amount that is diverted up at the heading of the American Canal.

Q. In other words, the amount of water that passes down the American Canal is what this big circle represents?

A. Yes. That is what that represents, and the diversions to the City is only that small proportion which was taken out by the City.

Mr. Grambling:
We offer in evidence Defendant's Exhibit No. 18.

Mr. Edwards:
No objection.

("D-18" was thereupon received in evidence by the Court and same is to be transmitted to the Court of Appeals as an original exhibit under order of the trial Court.)

Q. And I believe you stated that water is more than restored by effluent later on passing into the river?

A. The second exhibit back, which would be Exhibit 16, indicates that more water was returned to the river than the City has taken out during that same period.

Mr. Grambling:
Pass the witness.

Mr. Edwards:

No questions at this time.

Questions by the Court:

Q. Let me get it clear now, for once. The word has been used, or the two words have been used, and from your comments I am not sure whether it might have a technical meaning in your profession or not. What do you say "run-off" means?

A. "Run-off" is something to express volume, generally, in the engineering technology; and "discharge", when used by itself, relates to rate of run-off.

Q. Well, now, in one of these exhibits you use both on the same exhibit?

A. Yes, sir, but "discharge" was qualified by the word "annual", so it was an annual discharge for the year, and the runoff represented volume.

The Court:

All right.

(Witness excused.)

HASKELL R. STREET, a witness for the Defendant, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Grambling:

Q. State your name, please.

A. Haskell R. Street.

Q. You reside in El Paso?

A Yes, sir.

Q. How long have you lived here?

A. Eleven years.

Q. By whom are you employed, Mr. Street?

A. By the Public Service Board, Water Department.

Q. Does the Public Service Board operate the Water Department and the Sewer Department of the City of El Paso?

A. Yes, sir.

Q. It is a division of the City, is it, for operational purposes?

A. Yes, sir.

Q. Mr. Street, are you an engineer?

A. I am a chemist.

Q. You are a chemist?

A. Yes.

Q. What training have you had, Mr. Street?

A. Well, I have had a Bachelor's Degree in Chemistry from Stephen F. Austin College in Nacogdoches. I did graduate work in State College, Pullman, Washington, in Chemistry. I have a Master's Degree in Biology from George Peabody in Nashville, Tennessee.

Q. Now, what work have you done since you started your professional career.

A. I have taught chemistry and biology in high school for nine years, and I worked for the State Health Department on the mobile trailer laboratory for two years, and I have been with the City of El Paso since January, 1944.

Q. You have been with the City of El Paso since 1944?

A. Yes, sir.

Q. And you are now Assistant Superintendent of the—

A. The exact title is Assistant Superintendent in Charge of Treatment, which includes treatment of water at the water plant and the sewage plant.

Q. Now, have you kept up with the amount of effluent that is put back into the river by the City of El Paso and also with the amount of water that is diverted by El Paso from the river or from the Franklin Canal?

A. That's right. The water from both plants is metered each month or daily.

(At this point an instrument was marked for identification as Defendant's Exhibit No. 19.)

Q. Now, Mr. Street, you have before you Defendant's Exhibit No. 19. Will you state generally what that exhibit is? Was it prepared by you?

A. Yes. I prepared this.

Q. Where did the information that is shown on there come from?

A. From the meter records at the water plant which is a daily compilation of meter readings and a monthly summary throughout the years of operation.

Q. Are the statement and the figures shown here in your opinion accurate and correct?

A. Yes, sir.

Q. Now, Mr. Street, tell us specifically what this is, before I ask you specific questions?

A. This shows by year and by month in each year, beginning with 1944 and through the month of September, 1954, the amount of water which is called the "Net to Main"—that is the net water that leaves the plant into the distribution system through he meter and—

Q. Now. where is that meter located we are talking about?

A. At the water plant.

Q. At the water treatment plant?

A. Yes, sir.

Q. That's this plant down here? (Indicating.)

A. That is true.

Q. All right. Go ahead.

A. The amount of water that is produced from shallow wells near the plant and are pumped either into the canal or the plant; and the difference between those two columns, which is the "net river water" used or sent into the distribution mains from the plant through that same period, all in acre-feet.

Q. Now, does the City take water both from the Franklin Canal and from the river at times, Rio Grande River?

A. Yes, sir.

Q. What do they have to take the water out of the Rio Grande, do they have a pump there?

A. They have a brick and concrete structure and it has three pumps in it, with a total capacity of some 21 million gallons a day for pumping.

Q. I was just talking about the river, the intake out of the river?

A They have a pumping station, a structure there, for removing water from the river.

Q. Now, according to your figures, what was the amount of water they took out of the river for the year 1944? When I say "river" I mean river and/or Franklin Canal?

A. The total for the year of 1944?

Q. Yes?

A. This shows a net of 4.350 acre-feet

Q. All right. And that is according to the measurements from the meter there at the station?

A. That is right.

Q. And then what does it show—

A. Let me qualify that. That is not the amount taken from the river. That is the net amount from the river plant into the distribution system.

Q. All right, now, explain to us, so that everybody will understand, what you mean by "net amount" and the way you used it?

A. That means that there is a little bit more than that taken from the river itself but there is some wastage, to take the waste materials, the mud and materials back to the river, then there would be some loss.

The Court:

What month are you talking about?

Mr. Grambling:

He is talking about the year 1944, Your Honor.

The Court:

All right.

Q. That covers both the canal and the river water, does it?

A. Yes, sir. There was no river structure at that time, in 1944.

Q. When was the river structure built?

A. In the winter of 1949 and '50.

Q. Been there ever since?

A. Yes.

Q. How much water was taken out in 1945?

A. 1945, the total net from the river, 4.364 acre-feet.

Q. 1946?

A. 1946, the net from the river was 4.049.5 acre-feet.

Q. 1947?
A. 6,525.4 acre-feet.
Q. 1948?
A. 8,202.5 acre-feet.
Q. 1949?
A. 7,075.7 acre-feet.
Q. 1950?
A. 8,620.8 acre-feet.
Q. 1951?
A 6,962.5 acre-feet?
Q. 1952?
A. 9,016.2, acre-feet.
Q. 1953?
A. 11,384.4 acre-feet.
Q. 1954?
A. Well, including the month of September, for eight months only, 5,693.9.
Q. This table isn't carried any further than September of this year?
A. That is right.

Mr. Grambling:
We offer in evidence at this time Defendant's Exhibit No. 19.

Mr. Edwards:
No objection.

(Defendant's Exhibit Number 19 was thereupon received in evidence by the Court and a copy of this exhibit appears on the following page):

"D-19"

Water Diverted at Treatment Plant
Shallow Well Water Produced at Plant
(in Acre Feet)

Year	JANUARY			FEBRUARY			MARCH			APRIL		
	Net to Main	Shallow WELLS	Net River Water	Net to Main	Shallow Wells	Net River Water	Net to Main	Shallow Wells	Net River Water	Net to Main	Shallow Wells	Net River Water
1944	70.6	0	70.6	0	0	0	200.7	0	200.7	363.6	0	363.6
1945	0	0	0	27.7	0	27.7	371.2	0	371.2	500.1	0	500.1
1946	0	0	0	0	0	0	63.4	0	63.4	509.9	38.3	471.6
1947	70.2	21.0	49.2	278.6	109.2	169.4	583.7	130.0	453.7	693.3	117.9	575.4
1948	191.9	41.6	150.3	651.6	0	651.6	894.3	81.5	812.8	814.5	174.0	640.5
1949	32.1	10.4	21.7	545.0	0	545.0	867.4	89.2	778.2	856.4	166.4	690.0
1950	0	0	0	0	0	0	116.3	0	116.3	854.8	0	854.8
1951	963.2	0	963.2	703.7	0	703.7	214.7	84.3	130.4	581.4	552.9	28.5
1952	868.0	0	868.0	885.0	0	885.0	587.4	81.0	506.4	389.3	327.9	61.4
1953	765.0	0	765.0	823.0	0	823.0	1016.0	0	1016.0	1016.0	0	1016.0
1954	690.0	0	690.0	0	0	0	28.7	11.5	17.2	533.3	133.6	399.7

Year	MAY			JUNE			JULY		
	Net to Main	Shallow Wells	Net River Water	Net to Main	Shallow Wells	Net River Water	Net to Main	Shallow Wells	Net River Water
1944	352.6	0	552.6	536.2	0	536.2	671.2	0	671.2
1945	430.3	0	430.3	559.2	0	559.2	538.1	0	538.1
1946	611.2	87.4	523.8	817.2	70.3	746.9	822.7	94.7	728.0
1947	573.2	121.0	452.2	761.3	109.8	651.5	857.9	121.2	736.7
1948	956.6	176.8	779.8	970.7	215.2	755.5	1039.9	273.0	766.9
1949	977.3	183.2	794.1	1117.4	160.4	957.0	1143.8	166.8	977.0
1950	959.2	0	959.2	1093.6	0	1093.6	871.2	0	871.2
1951	569.1	526.1	43.0	1006.5	486.6	519.9	1085.4	283.3	802.1
1952	752.6	243.6	509.0	1075.6	36.6	1039.0	1081.7	25.3	1056.4
1953	1104.0	0	1104.0	1290.0	225.0	1065.0	1287.0	222.0	1065.0
1954	1073.8	161.8	912.0	1314.6	134.5	1180.1	1241.7	144.7	1097.0

Year	AUGUST			SEPTEMBER			OCTOBER			NOVEMBER			DECEMBER		
	Shallow Wells	Net River Water	Net to Main	Shallow Wells	Net River Water	Net to Main	Shallow Wells	Net River Water	Net to Main	Shallow Wells	Net River Water	Net to Main	Shallow Wells	Net River Water	Net to Main	Shallow Wells	Net River Water
1944	0	671.2	588.5	0	588.5	638.9	0	638.9	193.4	0	193.4	261.1	0	261.1	273.2	0	273.2
1945	0	538.1	514.4	0	514.4	424.3	0	424.3	454.8	0	454.8	404.1	0	404.1	139.8	0	139.8
1946	94.7	728.0	696.5	156.1	540.4	342.5	134 .8	207.7	409.7	157 .3	252.4	363.7	130.3	233.4	420.4	138.5	281.9
1947	121.2	736.7	864.4	197.5	666.9	838.7	185.6	653.1	816.6	109.4	707.2	636.1	0	636.1	797.1	23.1	774.0
1948	273.0	766.9	1052.3	220.5	831.8	934.0	248.4	685.6	898.8	136.6	762.2	547.2	0	547.2	818.3	0	818.3
1949	166.8	977.0	1148.6	161.5	987.1	924.5	153.0	771.5	559.0	4.9	554.1	0	0	0	0	0	0
1950	0	871.2	1128.5	0	1128.5	939.5	0	939.5	915.0	0	915.0	789.0	0	789.0	952.8	0	952.8
1951	283.3	802.1	1087.7	443.8	643.9	1134.1	175.8	958.3	917.9	0	917.9	518.3	0	518.3	733.3	0	733.3
1952	25.3	1056.4	1180.8	61.8	1119.0	1047.2	11.2	1036.0	733.0	0	733.0	557.0	0	557.0	646.0	0	646.0
1953	222.0	1065.0	1351.0	211.9	1139.1	1255.4	97.4	1158.0	844.0	34.3	809.7	919.0	76.1	842.9	765.2	184.5	580.7
1954	144.7	1097.0	1057.1	160.5	896.6	634.3	133.0	501.3			(8 months only)						

Year	TOTALS		
	Net to Main	Shallow Wells	Net River
1944	4,350.0	0	4,350.0
1945	4,364.0	0	4,364.0
1946	5,057.2	1,007.7	4,049.5
1947	7,771.1	1,245.7	6,525.4
1948	9,770.1	1,567.6	8,202.5
1949	8,171.5	1,095.8	7,075.7
1950	8,620.8	0	8,620.8
1951	9,515.3	2,552.8	6,962.5
1952	9,803.6	787.4	9,016.2
1953	12,435.6	1,051.2	11,384.4
1954	6,573.5	879.6	5,693.9

(At this point another instrument was marked for identification as Defendant's Exhibit No. 20.)

Q. Now, you have before you Defendant's Exhibit No. 20, have you, Mr. Street?

A. Yes, sir.

Q. And that states "Effluent from Sewage Plant in Acre Feet". What period does that cover?

A. Including January, 1944 through September of 1954.

Q. And it shows it for each month, does it?

A. Yes, sir.

Q. Now, just read the total annual effluent output from the sewage plant for each year. Don't read the months.

A. 11,086 acre-feet in 1944. 11,796 acre-feet in 1945. 11,425 acre-feet in 1946. 10,710 acre-feet in 1947. 10,412 acre-feet in 1948. 1,238 acre-feet in 1949. 12,193 acre-feet in 950. 12,997 acre-feet in 1951 12,876 acre-feet in 1952. 13,308 acre-feet in 1953. And, including September of 1954, 10,898 acre-feet.

Q. Now, where do these figures come from?

A. They are from the meter sheets, or daily and monthly, daily records and monthly summaries of the sewage treatment plant.

Q. Are they accurate figures?

A. To the best of my knowledge.

Mr. Grambling:

We offer Exhibit No. 20.

("D-20" was admitted in evidence and reads in words and figures as follows:)

"D-20"

Effluent from Sewage Plant in Acre Feet

Year	Jan.	Feb.	Mar.	Apr.	May	June	July
1944	780	712	838	841	936	985	1136
1945	898	792	887	878	1000	1047	1111
1946	887	792	862	868	991	1047	1120
1947	829	755.0	832	819	924	958	1043
1948	795	755	792	786	862	957	1000
1949	875	783	856	862	890	985	1142
1950	911	829	945	936	1025	1062	1157
1951	979	915	1006	985	1093	1074	1249
1952	1056	1018	1059	1025	1086	1114	1175
1953	976	915	988	985	976	1188	1243
1954	1059	1007	1132	1123	1234	1271	1356

Year	Aug.	Sept.	Oct.	Nov.	Dec.	Annual
1944	1040	1013	997	920	887	11,086
1945	1117	1080	1114	967	905	11,796
1946	1102	1016	948	945	847	11,425
1947	1034	951	872	807	786	10,710
1948	982	905	921	847	810	10,412
1949	1151	1037	954	865	838	11,238
1950	1182	1093	1086	1000	967	12,193
1951	1314	1160	1151	997	1074	12,997
1952	1182	1120	1120	991	930	12,876
1953	1332	1246	1209	1123	1127	13,308
1954	1406	1310				10,898 (Partial)

Q. Now, Mr. Street, what treatment is made of that sewage before it is dumped into the river?

A. It is given what is known as a, oh, a partial treatment in that it receives screening and grit removal, a very short period of irrigation, and then settling with separate sludge digestion.

Q. Well, now, is there any water included in that effluent that comes out of the wells of El Paso?

A. Yes, sir.

Q. Or does it all come out of the river?

A. Well, it includes all of the sewage from all of El Paso and the Army installations.

Q. And does it include water that is pumped from wells on the Mesa?

A. It must necessarily do so because that water couldn't go any place else. We don't have any other collection for sewage.

(At this point two photographs were marked for identification as Defendant's Exhibits 21 and 22.)

Q. Now, I hand you herewith Defendant's Exhibit 21. What is that?

A. That is a view of the river intake structure located just South of the water treatment plant, six hundred feet or so South of the water treatment plant, and as seen from the river bed itself.

Q. Now, is that on the river or is that on the Franklin Canal?

A. That is on the river. That is on the East bank of the Rio Grande River.

Q. Now, I hand you Exhibit No. 22. Will you tell us what that is?

A. That is a view of the same intake structure taken from farther, slightly farther, downstream, and at the same time.

Q. Does that intake plant have pumps in it?

A. Yes, sir.

Q. What capacity do those pumps have, do you know?

A. The total of the three pumps is about twenty-one million gallons a day.

Q In that intake plant there?

A. Within that structure.

Q. They could pump twenty-one million gallons a day fom the river, couldn't they?

A. Yes, sir.

Q. If they were operating at full tilt?

A. Yes, and if the water was there.

(Several other photographs were then marked for identification as Defendant's Exhibits 23 through 28.)

Q. Mr. Street, I am going to ask you to take those pictures there, Exhibits 23 through 28, and take each picture and explain to the Court what it is.

A. Defendant's Exhibit 23 is a partial view of the aerator, and it shows the primary settling basins located on the South side of the plant, of the plant structure.

Q. Is that the water treatment plant you're talking about?

A The water treatment plant. And a portion of the canal and the river may be seen in the upper right-hand corner. This is an integral part of the water treatment plant.

Q. That's this plant that is located approximately as shown on this drawing? (Indicating.)

A. That is right.

Q. Go ahead.

A. Exhibit 24 is a view of the floculators and settling basins of the same water treatment plant. Exhibit 25 is a view of the interior of the plant showing the filters. the filter operating floor. and looking from the front door toward the back part of the plant facing East. The camera would be facing East. Defendant's Exhibit No. 26 is a view of the intake structure on the Franklin Canal located immediately in

front of the building, the main building, of the water treatment plant and on the Franklin Canal. It is on the East bank of the Franklin Canal. Defendant's Exhibit No. 27 is a view of the rear of the water treatment plant building showing the Santa Fe switchyards there in the foreground. And Defendant's Exhibit No. 28 is a view of the water treatment plant taken from across the canal, from the West side of the canal. It shows the canal itself and the intake structure. This intake structure has been modified since this picture and does not now look like the picture that was first handed to me.

Q. That is the latest picture?

A. No. The other is the latest picture of the intake structure, but that is a picture of the overall plant itself.

(Defendant's Exhibits 21, 22, 23, 24, 25, 26, 27 and 28 were thereupon admitted in evidence, but these consist of photographs which are not suitable to be copied and same are to be transmitted to the Court of Appeals as original exhibits by order of the trial Court.)

Q. Now, Mr. Street, what is the capacity—well, first, what is the purpose of that water treatment plant?

A. The purpose of the plant is to take water from the river or the Canal, which is not in suitable state for domestic use, and to so clarify it and to so sterilize it and soften it so that it will be suitable for domestic use and safe for domestic use.

Q. Well, how much capacity do you have there? How much water can you treat a day there?

A. Well, since its enlargement in 1949 and '50, it is now a twenty-million-gallon-a-day plant, actually twenty million gallons a day.

Q. Mr. Street, how much did that plant cost to install?

A. As it now stands?

Q. Yes, sir, as it now stands?

A. I can only give you round figures, but in round figures about a million and a half.

Q. About a million and a half dollars?

A. Yes.

Q. Now, what happens to the water that comes into that plant after you treat it, what do you do with it?

A. After it is treated then it is pumped into the distribution mains of the City and goes to all portions of the lower part of town, South side, and up into Sunset area, Sunset Reservoir, and also in the Brown and Davis Reservoirs, and from there some of it is re-pumped into the upper sections of town, so that it reaches a good part, a large portion of the downtown or industrial area and a considerable portion of the residential areas in certain parts of town.

Q. Mr. Street, do you go with a representative of the District each month to determine how much water has been taken out of the river and the Canal?

A. We read the meters. That has been the practice over the years, to read the meters, on the first day of each month at a given time in the morning.

Q. And you get the amount of water that has been taken out of the Canal and that has been taken out of the river also?

A. That is right.

Q. Well, now, what is this tabulation here that I hand you? (Indicating.)

A. This is a tabulation of the amount of water which was metered as coming from the river and the amount of water that was pumped from the Canal in those months, all of the months of the year, from 1950 through the month of September, 1954, and a percentage of the amount of water which was pumped from the river, the river pumping structure, into the treatment plant.

Q. Now, could you tell us what is river water—well, what does that "R" stand for?

A. Well, in each block there are two letters; one is marked "R" for "River" and the other one is marked "C" for Canal." On line with the "R" the figure represents the amount of water pumped in that month and in that year from the river, and then on a line opposite the "C"—

Q. From the Canal?

A. The amount of water pumped from the Canal in that month or year.

Q. Are these readings accurate? They are metered readings, are they?

A. They are taken from the same metered reading sheets and the same figures that I read before.

(The exhibit was then marked for identification as Defendant's Exhibit No. 29 and shown to opposing counsel.)

Mr. Edwards:

Subject to our objection later, it is all right.

(Defendant's Exhibit No. 29 was thereupon received in evidence by the Court and a photostatic copy of this exhibit appears on the following page):

Q. Who was the man with you representing the District when these figures were taken?

A They have had numerous ones, but the man who has been there a number of times is Mr. Kirby. Jim Kirby, of the Reclamation Office, and then they have a ditchrider or gate tender down at the Franklin Canal who comes over sometimes

Mr. Grambling:
Pass the witness.

On Cross Examination.

Questions by Mr. Edwards:

Q. Mr. Street, after you get through treating this sewage effluent that we are talking about it still has a terrible odor attached to it, hasn't it?

A. There are times when it has some odor.

Q. And the residents down in the valley below El Paso have been complaining rather bitterly about it for a year or so, haven't they, or more?

A Last year they complained quite a bit. I haven't heard much from them this year.

Q. And if you were unable to make some arrangements whereby it were emptied into the river what would you do with it?

A. I imagine that if it were put on the ground it would run off some way.

Q. Just let nature take care of it?

A. That's what caused the river bed in the first place

Q. What records do you have prior to 1944 on the sewage effluent?

A. We have records in our plant down there in the office but I started in 1944 because that is the time

I assumed charge and that was the only ones I could personally vouch for.

Q. Would you mind bringing in the records that you have prior to 1944?

Mr. Grambling:

I got them right here for you, Mr. Edwards. (Hands to counsel.).

Mr. Edwards:

Is '39 as far back as it goes?

Mr. Grambling:

That is right.

Mr. Edwards:

You have no record farther back than 1939?

Mr. Grambling:

You know if you have any record?

The Witness:

No I wasn't able to find any.

Q. All right. Do you know whether they had a sewage effluent treatment plant—I mean, a sewage treatment plant, prior to 1939?

A. Yes, sir, they had.

Q. How long did they have it?

A. We have blueprints of a plant that was constructed in 1922 and modified later on at various times.

Q. Since 1922?

A. Yes.

Q. Did I understand you to say that you were going to build a new treatment plant, or were in process of doing it, for sewage?

A. I haven't testified to that effect but that is true.

Q. Where is it going to be built and when?

A. It is not a new treatment plant It is an addition to the present plant, and it is being built alongside the present plant and will be operated in conjunction with it.

Q And at the same location?

A. Right alongside of it, yes.

Q. And with the same degree of treatment?

A. No. The purpose of the addition will be to give further treatment to the sewage which now goes to the river.

Mr. Edwards:

That is all.

On Re-Direct Examination.

Questions by Mr. Grambling:

Q. Is that secondary treatment plant under construction now at the present time?

A. Yes, sir.

Q. What is the contract price on it, do you remember?

A. Approximately a million dollars.

Q. What did the present sewage treatment plant cost?

A. Well, in its present condition it would be difficult to say what it cost because it was built in 1922. I believe and it has been modified at least twice since, but I believe that the most recent additions

and changes that were made in 1943 cost about eight hundred thousand dollars.

Q. Will the secondary treatment plant take all the odor out of this effluent?

A. It will reduce it considerably. I hesitate to say it will take all of the odor away.

Mr. Grambling:
That is all

On Re-Cross Examination.

Questions by Mr. Edwards:

Q. Just one question. How much did the United States of America contribute to the construction of the water treatment plant?

A. I don't know exactly the figures. I think, roughly, a third of the cost.

Q. About a third, and the City is not adverse to accepting the benefits of Federal assistance in the way of facilities?

A. I wouldn't think so.

Mr. Edwards:
That is all.

On Re-Direct Examination.

Questions by Mr. Grambling:

Q. Is that the Army or Reclamation Service that contributed that?

A. I have no way of knowing just what agency it was.

Mr. Grambling:
That is all.

(Witness excused.)

At this point a recess was had from 5:00 o'clock P.M. on November 18, 1954, until 9:00 o'clock A.M. on November 19, 1954, at which time proceedings were resumed as follows:

HARLAN H. HUGG, a witness for the Defendant, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Grambling:

Q. Will you state your name to the Court, please?

A. Harlan Howard Hugg.

Q. Where do you reside, Mr. Hugg?

A. In El Paso, sir.

Q. Are you connected with the Water Department, Public Service Board here?

A. Yes, sir. I am General Manager of the Public Service Board.

Q. How long have you been acting in that capacity, Mr. Hugg?

A. Since September of 1952.

Q. What is your profession, do you have a profession?

A. I am a Registered Professional Engineer.

Q. What scholastic background have you got?

A. University of Texas and International Correspondence School.

Q. Just briefly, what professional experience have you had?

A. I was for eight years with the various railroads, the Denver & Rio Grande Western Railroad as Construction Engineer; and for several years on the Rock Island as Construction Engineer for the Rock Island System. Then I worked on the De Leuw-Cather & Company staff as an Engineer—

Q. In Chicago?

A. In Chicago, yes, sir. I was in charge of the construction on several railroad jobs with them. Then I went into the Army and was Operations Officer in my regiment overseas. Then I was back with De Leuw-Cather & Company in charge of the construction of the trainway through El Paso and at Beaumont, a 46-million dollar new location for Chicago Great Western; and then I was with De Leuw-Cather on the construction of the 29-million dollars Rapid Transit System in Cleveland, Ohio, before I came to El Paso.

Q. Then you were in charge of this underpass here?

A. Yes, sir. I made the original report on it and had charge of the plans and in charge of construction.

Q. That is the one now used by the railroads?

A. Yes, sir.

(At this point an instrument was marked for identification as Defendant's Exhibit No. 30.)

Q. Mr. Hugg, I hand you herewith Exhibit No. 30. Will you state what that exhibit is, please?

A. This is a rough sketch of the Rio Grande River, the Franklin Canal, and the location of the American Dam, American Canal, International Dam.

coming down to the Water Treatment Plant, and showing in rough sketch form the intake of the Water Treatment Plant, both from the Canal and from the river. It is just a hand-drawn sketch.

Q. It isn't purported to be drawn to scale, is it?

A. No, sir.

Q. But does it show the general location of these various structures and the river and Canal as they are located?

A. Yes, sir In rough form.

Mr. Grambling:

We offer this in evidence.

Mr. Edwards:

Let me ask one question. Mr. Hugg, as a matter of fact, there is a sluiceway, from the point you have designated as a sand trap there is a sluiceway from there to the river?

The Witness:

Yes, sir. There is.

Mr. Edwards:

You don't show that on the map?

The Witness:

No.

Mr. Edwards:

And isn't there another sluiceway immediately downstream from the water treatment plant?

The Witness:

That is right.

Mr. Edwards:

Would you mind putting them in? (Witness complies by drawing the items requested.)

Mr. Grambling:

We now offer that in evidence.

Mr. Edwards:

No objection.

("D-30" was thereupon received in evidence by the Court and a photostatic copy of this exhibit is on page following):

Note

Page 1169 is on Card 22

(At this point a photograph was marked for identification as Defendant's Exhibit No 31.)

Q. Mr Hugg, I hand you a photograph marked as Exhibit 31. Will you state what that photograph is?

A. This is a photograph taken down the river showing a group of twelve old caissons that were sunk into the river, according to our records in the Water Department, somewhere between 1882 and 1892, in which they sucked water from the river when the top surface was dry and used the underflow of the river from these old caissons that go in there.

Mr. Edwards:
What was that date?

The Witness:
Our records show twelve of them put in between 1882 and 1892.

Q. As I understand, they were simply put down there to get water from below the river when the river bed was dry, there was no flow in the river?

A. That is right. The history of the Southwestern rivers is that there are times of the year when they are dry on top but there is an underflow in them, and that is supposedly what those were put in there for.

Q. You know when that photograph was made?

A That photograph was made November 17th.

Q. Of what year?

A This year, sir. Those are still in existence in there, and we opened up two of them and re-used them. They were originally hooked up to the old Watts well which was put into operation and connected by

cast iron over on the other wells and sucked in from the old Watts well and used in the water system up to 1918.

Mr. Grambling:
We offer in evidence Defendant's Exhibit No. 31.

(Defendant's Exhibit No 31 was thereupon received in evidence but same being a photograph is not suitable to be copied and is to be transmitted to the Court of Appeals as an original exhibit by order of the trial Court.)

(At this point an instrument was marked for identification as Defendant's Exhibit No. 32.)

Q. Mr. Hugg, you have before you at this time Defendant's Exhibit No. 32?
A. Yes, sir.
Q. Will you tell us what that exhibit is?
A. This is a percentage that was taken off of the records of the Public Service Board, Municipal Water and Sewage System, to show from our meter readings the percent of water that is taken from the water treatment plant and from the wells that is used for the City of El Paso.
Q. Are these measurements actual measurements from your meters and records kept from meter measurements?
A. Yes, sir. We make current montly reports, or current daily reports and average them monthly and annually on all water that is produced in the system and the source it is produced from, and this is the percentage that is used from the water treatment plant and from the well system.

Q. Does the second column, that is the percent of total from deep wells, does that show the percentages taken from deep wells?

A. That is right, sir

Q. And this last column, does that show the percentage taken from the water treatment plant?

A. That is right.

Q. Does that include water that is taken both from the river intake and the Franklin Canal intake?

A. Yes, sir. Also from three shallow wells from near the water treatment plant. It is so hard it has to be treated when it is taken from there. That is one of the reports we have, that they stopped using the old Watts well because the water was so hard it had to be treated.

Q. What is the 7-year average for the water from deep wells?

A. The figures we have for a 7-year average is 54.9 that comes from deep wells and 45.1 comes from the water treatment plant.

Q. 54.9 from deep wells and 45.1 from the water treatment plant?

A Yes, sir.

Mr. Grambling:

We would like to offer in evidence Defendant's Exhibit No. 32.

Mr. Edwards:

No objection.

Defendant's Exhibit No. 32, having been received in evidence, reads in words and figures as follows:

"D-32".

Public Service Board, City of El Paso, Texas
Municipal Water and Sewage System.

City of El Paso Water Production.

City Fiscal Year	Percent of Total Yearly Water Production	
	From Deep Wells	From Water Treatment Plant
1946-1947	67.5	32.5
1947-1948	52.3	47.7
1948-1949	46.4	53.6
1949-1950	65.4	34.6
1950-1951	49.1	50.9
1951-1952	52.1	47.9
1952-1953	52.7	47.3
7 year average	54.9	45.1

Q. Mr. Hugg, I don't believe I have asked anyone yet what was the cost of this construction of this river intake that Mr. Street talked about yesterday?

A. May I refer to my notes?

Q. Yes.

A. The cost of the river intake was $157,738.21.

Q. And someone asked questions yesterday about how much was contributed to the water treatment plant. How much was contributed to the cost of the water treatment plant and by whom?

A. Our records in the Water Department show that the United States Government, through the Army, contributed $377,450 to the cost of the water treatment plant. The total cost of the water treatment plant was, or the total cost that the City paid

into the water treatment plant was, according to the records, $1,612,798.03. That does not include the $377,450 of the Government's contribution. I can break that down further, if you'd like to have it.

Q. Is the total of those figures a million nine hundred thousand, approximately?

A. Approximately, yes, sir.

Q. When was that contribution made by the Army?

A. Through the years 1941, '42, '43, and '44 I think was the final contribution; and it is reflected in our financial report, annual financial report by Thurston & Grider for 1944.

Q. Was that during World War II?

A. I believe it was, yes, sir.

(At this point an instrument was marked for identification as Defendant's Exhibit No. 33.)

Q. Mr. Hugg, you have before you Exhibit No. 33. Will you explain to us what that exhibit is?

A. This is a summary from the records of the Water Department on the estimated population, the actual number of services in the years—well, between the year 1910 and 1953; the yearly increases in water services, which we study all the time in order to develop trends and to get out an advance on our system; the gallons per capita per day; the water production in million gallons per day average; the water production in thousand acre-feet per year; and the peak day in million gallons; between the years 1910 and 1953; and on the year 1954, of course, we haven't finished those records.

Q. Could you tell us what the peak day up to the present has been in 1954?

A. The peak day was 39,069,000 gallons on July 28th.

Q. That's for this year?

A. That's right.

Q. I notice you say the number of water services in 1953 was 28,345. Was that the maximum in that year?

A. That is right.

Q. And the maximum as of October. 1954 was 29,964, is that correct?

A. That is right

Q. And I believe you show the peak water production in 1954 on July 28th as 39 million gallons?

A. That is right

Q. And the peak water production in 1953, 37.4 million gallons?

A. That is right.

Q. And the water production in thousand acre-feet per year for 1953 was 24.8 thousand acre-feet?

A. Yes.

Q. And this other exhibit we put in shows the percentage of that water that comes from the river and the percentage that comes from deep wells, is that correct?

A. That is correct.

Q. And by applying these percentages to these volumes you can tell the number of acre-feet that you got out of the river and the number of acre-feet that you got out of the deep wells. is that right?

A. That is right.

Q Now, Mr. Hugg, I notice here that not only has the number of services increased but that gallons per capita, gallons used per capita—that column 5 that says "Gallons per capita per day", does that mean per person?

A. That is per person. That is the trend across the entire nation.

Q. I notice the increase, say, in 1920, from an average of 80 gallons per capita per day—is that per day—?

A That is right.

Q. —to 144.4 in 1953?

A. Yes, sir.

Q. And that figure has been fairly uniform since 1950?

A. That is true.

Q. To what do you ascribe or attribute that increase in per capita?

A. Well, more bathtubs has helped, and more gadgets in the kitchen that use water; electric dishwashers, air conditioners.

Q. Have the air conditioners reflected a very definite increase in the use of water?

A. They have definitely, yes, sir.

Q. In other words, would it be fair to say that people are just a little more water-minded now than they used to be?

A. People across the entire nation use more water in their homes than they used to.

Q. You think they try to keep a little cleaner?

A. I hope so.

Mr. Grambling:

We offer in evidence at this time Defendant's Exhibit No. 33.

Mr. Edwards:

All right.

Defendant's Exhibit Number 33, having been received in evidence by the Court, reads in words and figures as follows:

Public Service Board, City of El Paso, Texas

Municipal Water and Sewage System

Data on Population, Number of Water Services and Water Production

Calendar Year	Population	Number of Services	Yearly Increase in Services	Gallons Per Capita Per Day	Water Production Million Gals. Per Day Avg.	Water Production Thousand Acre-Feet Per Year	Peak Day in Million Gallons
1910	39,279	5,300		77	3.0	3.4	4.5
1920	77,560	11,100	5,800	80	6.2	6.9	10.0
1930	102,421	14,500	3,400	81	8.3	9.3	14.2
1940	96,810	15,620	1,120	95	9.2	10.3	15.5
1950	130,003	21,044	5,424	142	18.5	20.7	31.5
1951	135,600	23,732	2,688	144	19.1	21.4	33.0
1952	148,165	25,942	2,210	144	21.4	24.0	33.8
1953	153,000	28,345	2,403	144.4	22.1	24.8	37.4

Note: Number of water services as of October 1943, 29,964.

Peak water production day 1954 on July 28th, 39,069,000 gallons

(At this point an instrument consisting of two sheets was marked for identification as Defendant's Exhibit No. 34.)

Q. Mr. Hugg, you have in your hands Defendant's Exhibit 34. Will you tell us what that is?

A. That is an extension, sir, from the Texas Board of Water Engineers.

Q. Is it a letter from the Texas Board of Water Engineers?

A. Yes, sir, a letter from them dated March 25, 1953.

Q. Who is it addressed to?

A. Addressed to Harlan H. Hugg, General Manager of the Public Service Board.

Q. You have the original of that letter, have you?

A. Yes, sir.

Mr. Grambling:
We would like to offer this letter in evidence.

Mr. Edwards:
No objection.

The Court:
What is the date of that letter?

Mr. Grambling:
March 25, 1953.

The Court:
All right.

Defendant's Exhibit Number 34, consisting of two pages, which was then read to the Court by Mr. Grambling, was thereupon received in evidence by the Court, and same reads in words and figures as follows:

"D-34".

(Seal of State of Texas)

Board of Water Engineers, State of Texas
302 West Fifteenth Street
Austin

H. A. Beckwith—Chairman
A. P. Rollins
James S. Guleke
Audrey Strandtman
Secretary

March 25, 1953

Mr. Harlan H. Hugg
General Manager
Public Service Board
P. O. Box 511
El Paso, Texas

Dear Mr. Hugg:

We have received your letters of March 18 and 21, 1953, in reference to Permit No. 1535, issued by the Board to the City of El Paso, Texas, on May 10, 1950.

Your letter-report is being filed in compliance with the provisions of the permit, which provides in part as follows:

"The City of El Paso, applicant, having filed herein, in support of its application, its plans and specifications for the construction of the reservoir hereinabove referred to, and said plans and specifications being now formally approved, the City of El Paso is authorized to proceed to the construction of said reservoir, for use in the impounding of waters authorized hereunder to be appropriated, and unless otherwise ordered by this Board, construction work on the said reservoir shall begin within one (1) year from date hereof and same be completed within two (2) years from said date. It is expressly provided that within ten (10) days after beginning actual construction of said works, the permittee, or its assigns, shall file a statement with the Board showing that such work was begun within the time limit allowed and the extent of the work done, and shall thereafter file monthly statements showing the progress of such construction work until final completion of said works."

On May 5, 1952, the Board issued to the City of El Paso, a permit for extension of time to begin work. The time was extended for one year from May 10, 1952. Therefore, it appears that the City has two (2) years from May 10, 1953, within which to complete construction under the terms of the permit and prior extensions of time for beginning heretofore granted by the Board.

We are returning your check No. 17736, in the amount of $10.00, there being no fee in connection with the filing of your letter-report giving the status of the project.

Very truly yours,
(S.) (MRS.) AUDREY STRANDTMAN,
(Audrey Strandtman),
Secretary Board of Water Engineers.

AS:wj
Encl.

(At this point an instrument was marked for identification as Defendant's Exhibit No. 35 and shown to opposing counsel.)

Mr. Edwards:
No objection.

Q. Mr. Hugg, you have in your hand Defendant's Exhibit No. 35. Will you tell us what that exhibit purports to be?

A. That is a permit for the extension of time on the construction of the reservoir and the other facilities for taking water from the river that was referred to in Exhibit No. 34.

Mr. Grambling:
We would like to offer this exhibit in evidence at this time.

Mr. Edwards:
Yes, no objection.

Defendant's Exhibit No. 35, which was then read by Mr. Grambling, was received in evidence by the Court, and reads in words and figures as follows:

"D-35".

Permit For Extension of Time Issued to City of El Paso

82243

No. 1535c

Be it known, that Whereas, the City of El Paso, the postoffice address of which is El Paso, Texas, filed with the Board of Water Engineers for the State of Texas, on May 5, 1952, its petition for an order granting an additional extention of time for the beginning of the works described in a permit to appropriate certain public waters of the State of Texas, from the Rio Grande, in El Paso County, Texas, issued by the Board of Water Engineers on the 10th day of May, A. D., 1950, numbered 1935; and

Whereas, the said Board has duly considered the said petition for an additional extension of time, and is of the opinion that said petition should be granted;

Now, Therefore, in consideration of the premises, the Board of Water Engineers for the State of Texas, having fully considered the merits of said petition for such extension of time, filed by said City of El Paso Does Hereby Grant to the said City of El Paso an additional extension of time for the beginning of said works, as described in its original application

for permit, said work to be begun within one (1) year from May 10, 1952.

Given under the hand and seal of the Board of Water Engineers for the State of Texas, this the 5th day of May, A. D., 1952.

BOARD OF WATER ENGINEERS,
(S.) H. A. BECKWITH,
(H. A. Beckwith),
(Seal) Chairman,
(S.) A. P. ROLLINS,
(A. P. Rollins),
Member,
(S.) JAMES S. GULEKE,
(James S. Guleke),
Member.

Attest:
(S.) AUDREY STRANDTMAN,
(Audrey Strandtman),
Secretary.

Q. Is that permit referred to the permit for 27,000 acre-feet of water which the City has?

A. That is right.

Q. Mr. Hugg, there was some discussion yesterday about the City using the Vinton Drain to transport for a part of the distance water which is produced by the City in the Canutillo wells. You remember that testimony?

A. Yes, sir.

Q. Can you tell us where this Vinton Drain is located, what land it is located on?

A. The Vinton Drain runs down through the middle of some 380 acres that the Public Service Board owns,

that the City of El Paso owns, North of Canutillo, and the shallow wells that were put in down there produce water that runs down into the river and down to the water treatment plant, and it is in that same property and they cross no other property except the City's own property and into the river.

Q. And that part of the Vinton Drain which they use, is that located on land owned by the City?

A. That is right. There are several drains in that property, and those drains flow over and all wind up into this main drain that comes in through it and on to the river in the South corner of the City's property.

Q. The Court asked one of the witnesses yesterday, I believe Mr. Phillips, about these drains. I don't think it was explained very fully. Will you tell us what this Vinton Drain, for example, consists of?

A. It is just a dirt ditch that comes down through the property and picks up any water that happens along.

Q. Is it lined with concrete or anything like that?

A. No, sir.

Q. How deep is that drainage ditch, approximately?

A. Well, where it goes through the City's property it is about four to five feet deep. It varies as it goes through according to the elevation of the ground around it.

Q. And how wide is it?

A. Possibly six feet to eight feet wide.

Q. At the top or at the bottom?

A. At the top.

Q. It would be narrower at the bottom then?

A. That is right.

Mr. Grambling:

Pass the witness.

On Cross Examination.

Questions by Mr. Edwards:

Q. Mr. Hugg, the records of the water office here in El Paso disclose, do they not, that the City, as far back or at least as far back as 1918, ceased to take any water from the river at all for municipal purposes, don't they?

A. Up until when?

Q. It ceased at least as far back as 1918?

A. You mean they stopped taking it from the river in 1918?

Q. That is what I am asking you?

A. That is right.

Q. They stopped in 1918?

A. That is right.

Q. And they completely abandoned the river as a source of supply until November of 1943 when this treatment plant was put in, pursuant to the contract of December 1, 1941?

Mr. Grambling:

Now, Your Honor, whether they abandoned it is a legal question. That they ceased taking water, this is a fact; but the other one, that is a legal conclusion.

The Court:

I will overrule the objection. There may be a legal conclusion and yet "abandonment" is a word of different shades of meaning.

A. As far as taking any water out of the river between 1918 and 1943, the records do not show that

there was any taking out of water. The facilities that are in the river were put in before 1890 and are still in there and are being used at the present time, so I don't know the abandoning part of it.

Q. But your records do disclose that between 1918 and 1943 the City didn't take any water out of the river for municipal purposes?

A. That is right, sir.

Q. And that treatment plant that you have described at considerable length, and concerning which photographs have been offered in evidence, is the plant that was put in by the City with the help of the United States pursuant to that contract of December 1, 1941, isn't it?

A. I don't know about pursuant to the contract. I guess that is the same as the old Watts well where they originally took the water out.

Q. Mr. Hugg, the defendant has offered a number of exhibits here with some interest—I have copies here—Defendant's Exhibit Number 18, which purports to show the proportion of the diversions by the City of El Paso as against the El Paso County Water Improvement District Number One; and exhibits concerning which you just testified, Defendant's Exhibit Number 32 "Percent of total yearly water production from deep wells and from the water treatment plant", and Defendant's Exhibit Number 33 pertaining to "Data on population and the number of water services and water production". Did you by any chance prepare an exhibit showing the percentage of water taken by the City of El Paso from the river or Franklin Canal since the 1944 contract as compared with the total source of supply now available to the City of El Paso?

A. I don't understand your question on that.

Q. What I am referring to is this area for which the City paid $714,145.35 to secure a brand new source of supply for water?

Mr. Brockmoller:
We object to the question, Your Honor. That was the very matter that the Court sustained our objection on the other day.

Mr. Edwards:
But the testimony has developed now a situation where it is all admissible.

Mr. Brockmoller:
There hasn't been any testimony about it. The Court kept out the deeds about purchases of land, and so forth. It doesn't have any bearing on any issue here, seems to me it is wholly irrelevant and immaterial to any issue in this case.

The Court:
Well, the testimony that has come in here this morning may make it somewhat relevant. I will overrule the objection and hear the testimony.

Mr. Edwards:
Will you repeat the question?

Reporter: Reads) "Q. What I am referring to is this area for which the City paid $714,145.35 to secure a brand new source of supply for water?"

A. I still don't understand.

Mr. Guinn:

May we have a continuing objection? And I would like to again state to the Court, if I may, there is no legal pleading on which we assert any right here by necessity. Our right is based on an asserted legal right to this water, and several various phases—the Court is familiar with one of them, is the amount we put in we have the right to take out, and the prior use, which is a legal question. We do not base our claim on water necessity and, consequently, any purported source of supply would not be relevant to the legal issues here. We have testimony before the Court that in 1941 the Reclamation, and all of them, thought that it was absolutely necessary to take this water Maybe there is a change of opinion as to whether it is or is not; but we are not basing any legal right on that nor do we believe that could affect the legal decision of this Court because it is not one of necessity.

The Court:

Well, I can take care of those angles all right in the final analysis, but there has been testimony or proof put in here about the percentage of water from wells and percentage of water from the treatment plant, and so forth, and it may be that we are getting around to the fact that this testimony that is sought now might have an informative place in the case.

Mr. Guinn:

I understand, but may I state that the purpose of putting in the evidence about these percentages, and so forth, is that we have before the Court the ordinary flow of the river for years as it came by the City, and the question of what right we may have to

take out of there might be important on that point of the prior right to take from the ordinary flow of this water, not storage water but river water that we had available prior to this storage period and to show the amount that was taken out of the river. I merely wish to call to the Court's attention the purpose of why we offered that.

The Court:

Well, you may have your point preserved to all of this line of inquiry.

Q. Now, Mr. Hugg, you are familiar with this brochure that was put out in May of this year by the City of El Paso with the concurrence of the water board?

A. Yes, sir.

Q. You are familiar with all that data?

A. Yes.

Q. And assisted in the preparation of this pamphlet?

A. Yes, sir. You still want me to answer that question you asked a while ago? There was no chart made as you suggested.

Q. Now, according to this information you put out, Mr. Hugg, it is stated: (Reading) "During the past eighteen months an exploratory drilling program has been pursued under the direction of the U. S. Geological Survey and the Texas Board of Water Engineers, the cost being borne by the U. S. Army, the U. S. Air Force and the City of El Paso, which has more clearly defined the known underground reservoirs. While the drilling has been completed, the U.S. Geological Survey's report has not yet been released. Consequently, the Municipal Water and Sewer System

employed William F. Guyton, consulting ground-water hydrologist, to review and summarize the drilling of the test holes, and listed below is the summary of conclusions of Mr. Guyton's report dated March 1954: 'Mesa Area. At least 4 to 5 million. . . .'"

The Court:
Now, just a minute. Does this come around to reflecting any data of the kind that you have been asking about?

Mr. Edwards:
Yes, sir. I am just getting ready to read it now.

The Court:
About the kind of information that you asked him if he had by chance prepared?

Mr. Edwards:
Yes, sir.

The Court:
Is that what you are saying?

Mr. Edwards:
Yes, sir. That is what I am beginning to read now.

Q. (Continues reading): "Mesa Area. At least 4 to 5 million acre feet of fresh water is stored in the sands and gravels beneath the Mesa in Texas. It will be economically feasible to withdraw more than one-half of this through wells. Recharge to the ground-water reservoir is estimated by the Geological Survey to be at the rate of about 15 million gallons per day. Most of this can be intercepted by wells. At least 25

to 40 million gallons of fresh water per day, therefore, can be pumped from the ground-water reservoir for a period of 100 years. If the city and its associates desire to preserve this supply of fresh water for future use, they should gain control of the ground-water reservoir insofar as possible in order to limit its depletion by others." Now, you did that, didn't you, Mr. Hugg?

A. Yes, sir. We did that. We covered the land that was involved up there in order to prevent the over-pumping of that area by agriculture. In Lubbock County alone last year there was 4,800,000 feet of water pumped from underground basins for irrigation, which is more than we have in that entire supply up there. Now, that well field, it is not new, it has been used since 1912. In 1912 they started the wells in the Mesa and have been drilling there. At the present time it is estimated about 29 million gallons a day that is being pumped out of that by existing wells of industry, the lower valley, the City and various others, out of that area; but if that was not protected there wouldn't be any supply for anything.

Q. I see, and prior to your acquisition of the title of that land the City of El Paso made contracts with the owners of that land for the acquisition of it as a source of water supply for the City of El Paso, didn't they?

A. To protect the source.

Q. I said first they made contracts to buy the land?

A. Yes, sir.

Q. And then they bought the land?

A. That is right.

Q. Now, the articles of the City Charter relative to the City's power with reference to its water system

haven't been changed at all since 1941, have they, Mr. Hugg?

A. I don't understand just exactly how you say that. I haven't been here since 1941, so make it plainer, please.

Q. What I mean is that the authority by which the City Council and the Mayor of the City of El Paso decided to make these contracts whereby they spent over seven hundred thousand dollars of the people's money was the same in the Charter as it was back in 1941 when the contracts were made for the benefit of the water system of El Paso?

A. These contracts were made by the Public Service Board.

Q. Well, the contracts are in evidence, the contracts of '41 and '44; the one between the United States and the District and the City of El Paso in 1941, and then in 1944 the contract between the United States and the City of El Paso and the Elephant Butte Irrigation District and the El Paso County Water Improvement District Number One; and also the contract of August 10, 1949 between the City and the District; and the subsequent contract of December 1, '49; they were all made under the same City Charter as the contracts that were made for the acquisition of this land here for which the City spent over seven hundred thousand dollars?

A. The City Charter, I don't believe there has been any change in it.

Q. No change?

A. That is right.

Q. So they had the same authority that they had in 1954 to go out and buy this area?

A. Except in 1951-1952 the Public Service Board was created for the water and sewer system.

Q. But these deeds are made to the City of El Paso?

A. Yes, sir.

Q. All three of them? (Indicating.)

A Yes.

Mr. Edwards:

We would like to offer these deeds in evidence at this point.

Mr. Grambling:

We don't think there has been anymore evidence that makes them admissible.

The Court

I think the evidence is in that the purchases were made.

Mr. Edwards:

Yes, and I want to show now what they were, and we offer "Plaintiffs' Exhibit 108" and 'Plaintiffs' Exhibit 108a" and "Plaintiffs' Exhibit 108b".

The Court:

Let me see them. (Same were handed to the Court.)

Mr. Grambling:

The only possible purpose for which they could be admissible, if they were admissible at all, would be to show what supply was under each section of that land, and certainly that isn't admissible in this lawsuit. As you say, he has already stated over our objection that they spent seven hundred thousand dollars to buy land as a source of water supply. Now to

put this minute detail in, I don't see how it could be admissible for any purpose.

Mr. Edwards:

I think it has a bearing, Your Honor, on their claim that their prior contracts were beyond the authority of the City. I expect to show that they are not claiming that these contracts were beyond the authority of the City and they were executed under the same Charter.

Mr. Grambling:

That is a question of law, and certainly this witness wouldn't know which one was authorized and which one wasn't. This was for the purchase of land and not to give away as a gift vital property of the City, as those other contracts attempted to do.

The Court:

(To Mr. Edwards.) What was the point you were just making?

Mr. Edwards:

I said I intended to show that this transaction was handled under exactly the same Charter as these contracts which they now claim are invalid. I was going to follow up with that question, whether they considered if these contracts for the acquisition of land were also beyond the authority of the City.

The Court:

Well, I don't see how there really could be any question as to these under the City Charter. The City has authority to provide water supply and water works.

Mr. Edwards:

Our position is that the other contracts are just as valid as these are.

The Court:

Maybe so, but that is the question here. I think it is easy to decide that these purchases are within the power of the City but the other brings into view some different circumstances. Now, the record already shows that the City did spend a considerable sum of money in purchasing land in what you call the Mesa area, is it?

Mr. Edwards:

Yes, sir.

The Court:

And the witness says it was done as a protection towards water supply for the City and, of course, there is some production being made out there now, as I understand it, and the fact that it was purchased and the magnitude of the transaction is already in the record and I don't see that this testimony has any particular pertinance here now, this documentary testimony.

Mr. Edwards:

Just to show what the transaction was definitely concerning about which I am about to make further inquiry.

The Court:

Well, I will sustain the objection at this time. You can make your further inquiry and we will see what develops.

Q. Now, what I wanted to ask you, Mr. Hugg; the City is not now claiming that the contracts by which they secured this land concerning which you testified from George C. Fraser, George L. Burr and John K. Olyphant, Jr., that that contract is in any way ultra vires or void or beyond the authority of the City; they are not making any claim to that effect, are they?

A. I am not making any claims.

Q. I am asking you about the City. You are on the Public Service Board, aren't you?

A. That is right. These contracts are not in question, no, sir.

Q. And there is no claim made that there is any invalidity attached to these?

A. No, sir.

Q. Or with reference to the contract between Robert B. Price, Jr., joined by wife, Georgiana Price, together with Barbara Price Curlin and Husband, Jack V. Curlin; or the contracts with Price's Producers, Inc.?

A. Are those the actual deeds or the options?

Q. No. These are the actual deeds. Now, what I am asking you about is the contracts that they had?

A. The actual deeds were consummated and the land has been transferred.

Q. And the City has never claimed that that was an ultra vires transaction or beyond its power or authority, has it?

A. Not that I know of.

Q. Now, incidentally, on your population figures here, Mr. Hugg, I see you just went back to 1910 on the El Paso population. When you were getting up these figures did you happen to look at the census figures for 1880, 1890 and 1900?

A. No, sir. I didn't.

Mr. Edwards:

Can we agree on those, Mr. Grambling? I know what they are.

Mr. Grambling:

Whatever the census figures are.

Q. You just went back to 1910 on your figures?

A. That is right.

Q. Well, I would like to go back further and let the record show that according to the population of El Paso by the United States Census, as shown on Page 302 of the World Almanac Book of Facts for 1954, in 1880 the population was 736; 1890: 10,338; and in 1900 it was 15,096. And you have picked it up from 1910 on?

A. Yes.

Mr. Grambling:

We have no objection to those figures.

Mr. Edwards:

I understood we agreed on that.

Mr. Grambling:

Yes.

Q. Mr. Hugg, getting back to El Paso's water system, the City does not furnish water to its population free of charge, does it?

A. No, sir.

Q. It has for a number of years been operating at a profit, has it not?

A. We try to.

Mr. Edwards:
That is all.

Mr Grambling:
No further questions.

(Witness excused)

WYATT RICHARDS, a witness for the Defendant, having first been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Sims:
Q. What is your name?
A. Wyatt Richards.
Q. Where do you live?
A. 4747 Emery Way, up the Valley.
Q. In El Paso?
A. Yes, sir.
Q. What is your age and occupation?
A. Fifty-eight. Abstracter. I work for the Pioneer Abstract Company.
Q. Are you an officer in the Pioneer Abstract & Guarantee Title Company?
A. Yes, sir.
Q. What office do you hold?
A. Assistant Secretary.
Q Mr. Richards, when did you first come to El Paso?
A. In '21.
Q. 1921?
A. Yes, sir.

Q. And have you worked as an abstracter examining the public records and titles of El Paso County since that time?

A. Most of that time, yes, sir.

Q. Are you familiar with the base titles of most of the parts of El Paso County?

A. Most of it, yes, sir.

Q. Are you familiar with Campbell's Addition?

A. Yes, sir.

Mr. Sims:

If the Court please, this is an original map (indicating) in the office of the County Clerk which we will prove up by the County Clerk in a few moments. He is the next witness.

Mr. Edwards:

We will save you bringing the County Clerk over. We know that is a part of the County records.

Mr. Sims:

All right; and will you agree to let us substitute a true copy of this exhibit in the record?

Mr. Edwards:

Sure.

The Court:

All right.

Q. Mr. Richards, I will ask you to examine this map that has the identification of "Campbell's Addition to El Paso, Texas" on it. I will ask you to state whether or not you are familiar with the area shown by this Campbell's Addition?

A. What do you mean "familiar with it"?

Q. Well, familiar with the base titles?

A. Yes, sir.

Q. I believe the evidence will show that this map was not recorded in the office of the County Clerk until around about 1894—

A. I don't remember the exact date.

Q. Well, what I was getting at, regardless of the time when it was actually recorded in the County Clerk's Office, do you know whether or not sales of property were made with reference to this Campbell's Addition before it was recorded in the County Clerk's Office?

A. Yes, sir, they were.

Q. Can you give us some instances, and the dates, when property in Campbell's Addition, as shown by the map of Campbell's Addition, was sold, giving us the dates and the names of grantors and grantees and the book and page number where the instruments are recorded?

A. I made a list of a few instruments taken from blocks along 8th Street, on each side of 8th Street, and I have a list of a few of them. I think twelve or thirteen.

The Court:

Where is 8th Street?

The Witness:

Right here (indicating on map).

Q. That is where the Canal is at the present time?

A. That is right. And I commenced here (indicating). That is the Franklin Canal (indicating). I commenced along in here and I picked up a few here (indicating).

Q. On both sides of 8th Street?

A. That is right.

Q. Will you read those into the record?

A. Block 59 (indicating), there is a deed from J. F. Crosby to N. D. Eastman, recorded in Book 15, Page 11, of the Deed Records—and that was dated April 21, 1883—Deed Records of El Paso County. Then there is a deed—it is not necessary to give initials?

Q. No, sir.

A. Then there is a deed from Eastman to Madden, recorded in Book 20, Page 67, Deed Records of El Paso County, and that was dated October 20, 1883. Another one from Madden to Etter, of record in Book 9, Page 154—all of these are from the Deed Records of El Paso County, Texas—dated April 3, 1886. Then in Block 60 of the Campbell Addition—

Q. Point that out to the Court, where Block 60 is.

A. Right here (indicating). And all of these deeds either refer to the map of Campbell Addition or to the Campbell Addition map to the City of El Paso, Texas. In Block 60, Flood to Bailey, deed of record in Book 4, Page 426, dated January 16, 1883. Bailey to Dennison, recorded in Book 9, Page 110, dated March 15, 1886. Mills to—no, this is in Block 61.

Q. Now, where is Block 61?

A. 61 is right there (indicating). Mills to Hague, in Book 4, Page 1193, dated July 11, 1883. Williams to Pierson, in Book 5, Page 210, dated October 19, 1883. Bell to Williams, in Book 5, Page 164, dated October 23, 1883. Flood to Watts, in Book 7, Page 30, dated December 15, 1883. Then in Block 45, right here (indicating), South side of 8th Street; Hague and Mills to Punich, in Book 4, Page 133, dated December 16, 1882. Caniff to Shutes, in Book 4, Page 353, dated

in January, 1883. They left the date of the month out. Flood to Watts, in Book 7, Page 30, dated December 15, 1883. There are others but I never got anymore of them.

Q. There are many?

A. Yes, sir, there are others.

Q. Mr. Richards, have you often seen this old map which is kept separate from the map that is recorded in the back of Book 1 of the Deed Records?

A. That is right.

Q. And all the lots that you have mentioned, all the properties that were sold, are along what is 8th Street, and you took sales on both sides of what is 8th Street?

A. That is right.

Q. Now, this map shows that it was filed November 14, 1887, "F. P. Clark, Clerk; S. C. Slade, Deputy", and you are familiar with that?

A. I am familiar with that record. Clark was a clerk before my time.

Q. I know that's before you came to El Paso?

A. That's right.

Q. He was the County Clerk?

A. That's right.

Q. And there is a certificate here: "I do hereby certify that the above survey was actually made on the ground according to law and that the stakes were put in . . ."—I can't read that, it is illegible . . . were put in * * and the divisions of land here shown are true and correct. Given under my hand this 11th day of November, 1887. J. W. Eubank, Surveyor of El Paso County." Now, that was the Certificate of Eubank?

A. I know, from the record I know that Eubanks was a surveyor.

Q. But the deeds that you have referred to, many of them are even prior to Eubank's certificate?

A. That is right.

Q. And this map also shows that lots were twenty-six feet in front, the alleys were 20 feet wide, blocks 260 feet square, and the streets 70 feet wide except El Paso Street which is shown to be 82 feet wide?

A. The majority of the blocks in Campbell's Addition were 26-foot lots and 120 feet deep.

Q. 120 feet deep?

A That is right.

Mr. Sims:

Mr. Edwards, will you admit this is Book 1 of the Deed Records of El Paso County, Texas? (Indicating.)

Mr. Edwards:

Yes, sir.

Q. Mr. Richards, in the back of Book 1 of the Deed Records of El Paso County, Texas, there appears a map of Campbell's Addition to El Paso, Texas, apparently the same map that was introduced here or exhibited to you just a few moments ago? (Showing to witness.)

A. With the exception that this one covers a little more territory.

Q. This one covers a little more territory?

A. Yes, sir.

Q. Otherwise it is the same map?

A. It is considered the same map of Campbell's Addition, yes.

Q. Do you see the date of its recording?

A. I don't know. I think it was along about the same time. (Counsel hands book to witness.) That's February 24, 1896

The Court:

Well, the County Clerk had signed at one place on this other map, the one you have mounted there, the first one you showed the witness.

Mr. Sims:

Yes, sir. This map was filed on November 14, 1887, of Campbell Addition. The map which appears in the back of Book 1 of the Deed Records was recorded in 1896.

The Court:

And it is an enlarged map?

Mr. Sims:

It takes in more territory than this (indicating) does.

Q. But, Mr. Richards, with reference to the area shown on this first map, which was filed in 1887, are the blocks and lots and streets laid out in the same manner as they are in the 1896 map?

A. That is right.

The Court:

All right.

Q Mr. Richards, did you run across any of the deeds which were recorded prior to 1887 from the original proprietors of Campbell Addition?

A. I think I gave you one of them here. Crosby is one of them.

Q. J. F. Crosby?

A. Yes, sir. And I could pick some more off if I had a little time.

(At this point an instrument was marked for identification as Defendant's Exhibit No. 36.)

Q. I show you a copy of the map which is recorded in 1896, and which is marked "Defendant's Exhibit 36". I ask you to state if that is an accurate portrayal of Campbell Addition?

A. I think this is actually a photostatic copy of it.

Q. In your opinion that is a true copy?

A. That is right.

Mr. Sims:

We offer in evidence Exhibit 36.

Mr. Edwards:

No objection.

(Defendant's Exhibit No. 36 was thereupon received in evidence but same is not suitable to be copied and is to be transmitted as an original exhibit to the Court of Appeals by order of the trial Court.)

The Court:

What did you say about deeds from Campbell?

Mr. Sims:

Crosby, Your Honor.

A. I have a deed here from Crosby, which was one of the original owners of Campbell Addition. But I didn't pick out any deeds of the Campbells. But the Campbells weren't the only ones. The Campbell Real Estate Company, I think there's some other in there as officers of the Campbell Real Estate Company.

Q. You do know that J. F. Crosby was one of the original proprietors of Campbell Addition?

A. That is right.

Q. And all of the deeds that you have given us were prior to the recorded map of 1896?

A. That is right.

Q. And several of them were prior to this one of 1887?

A. That is right.

Mr. Sims:

Pass the witness.

Mr. Edwards:

No questions.

(Witness excused.)

LOWDON WINGO, JR., a witness for the Defendant, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Brockmoller:

Q. Please state your name?

A. Lowdon Wingo, Jr.

Q. Mr. Wingo, you are the Planning Director of the City of El Paso at the present time?

A I am.

Q. What are your professional qualifications, Mr. Wingo?

A. I am a graduate of the University of Chicago, with a Master's Degree in Social Sciences in the field

of Planning in 1950. I have been employed in a planning capacity by the City of El Paso since April of 1952; since September of 1953 as Director of Planning.

Q. Mr. Wingo, have you in your capacity as a Planning Director made or initiated any studies of the population of the City of El Paso and its growth in the last few years, or since 1940?

A. Yes, sir.

Q. Would you tell us what the growth has been since that time and its rate of increase?

A. In 1940 the population of the City of El Paso was about 96,800 people, according to the United States Census. The County population was about 131,000 at that time. The 1950 census showed a population for the City of 130,484, or a compounded increase over a period of time of about 2½-percent. The County population in 1950 was 194,968, an increase of a little more than 2½-percent per annum, compounded. We have recently concluded a study with regard to the population of the City of El Paso as of August 5th of this year. The basis of that study was the 1950 Census plus the enumerated dwelling units in the City of El Paso at that time. We arrived at a figure of 182,505. We have subsequently cross-checked that figure with what is known as the cohort method, using school census data, and we find that that sometime is within two percent or checked within two percent of the cohort method. The County population, again using the school cohort method, essentially comes to 228,500. Now, that is exclusive of military personnel stationed on base, a figure which is difficult to arrive at and which we estimate at approximately fifty thousand people in the County and City of El Paso.

Q. Will the military give you those figures?

A. No, sir.

Q. They will not?

A. No, sir.

Q. There has been then, according to the studies made, an increase of what percent per year?

A. The increase in the City's population over 1950, in other words, in the last four years, is approximately a forty percent increase.

Q. Now, Mr. Wingo, since 1950 the City has annexed some territory, has it not?

A. Yes, sir.

Q. And that is taken into consideration in that increase?

A. Yes, sir.

Q. Now, the last annexation to the City was of the so-called Country Club area?

A. Yes.

Q. And what was the estimated population at the time of this annexation?

A. You mean just prior to it or just after?

Q. Well, just prior to it? Or after it?

A. Well, including the Country Club area, the Upper Valley annexation, it was 182,505.

Q. Just prior to the annexation, what was it?

A. It was 178,000, approximately.

Q. In other words, the annexation only took in an additional some five thousand population?

A. Yes, sir.

(At this point a map was marked for identification as Defendant's Exhibit No. 37.)

Q. Now, Mr. Wingo, I hand you herewith Defendant's Exhibit Number 37 and ask you what that is?

A. This is a map of a portion of the Metropolitan Area of the City of El Paso on which are inscribed in black the city limits of the City of El Paso on August 6th of this year, and on which are inscribed in red the city limits of the City of El Paso as they existed prior to December 4th of 1952. Indicated on the key here they are the city limits in red as they existed on October 1, 1952.

Q. And the black line indicates those as of the present time?

A. Yes, sir.

Mr. Brockmoller:

I would like to offer Defendant's Exhibit 37 in evidence.

Mr. Edwards:

No objection.

(Defendant's Exhibit No. 37 was thereupon received in evidence by the Court, but same is not suitable to be copied and is to be transmitted to the Court of Appeals as an original exhibit by order of the trial Court.)

Q. Mr. Wingo, is there a large urban development in the areas that were annexed after 1952?

A. You mean after the date of October 1, 1952?

Q. Yes?

A. There was substantial urban development in the annexation of December 4, 1952, which annexed the old town of Ascarate to the City of El Paso. That area was almost entirely of urban development.

Q. And the Country Club area, is that rural or is that urban in character?

A. That is an area which we would characterize as of mixed nature. There are substantial urban characteristics about it in certain areas; for example, the Smelter Town and Buena Vista areas, as well as certain area in the vicinity of the Country Club actually.

Q. And do you know from your work whether there is any further urban development going on in that Country Club area?

A. Yes. We have before us—by "us" I mean the City Planning Department—plans in connection with 350 acres of land South of the Country Club itself which will total somewhere between twelve and fourteen hundred homesites. It will probably take up about sixty percent of the available open land there, which upon the conclusion of this development will give it a strong urban classification.

Mr. Brockmoller:
That is all.

Mr. Edwards:
No questions.

Questions by the Court:

Q. Where is this Country Club area you are talking about, on this map? (Indicating.)

A. The Country Club is located in this location here (indicating). This is generally known as the Country Club area. This is the cross-roads, the intersection of Highway 80 and Highway 80-Alternate.

Q. This is the city limits now? (Indicating.)

A. Yes, sir.

Q. Now, the former city limits you say are delineated in red?

A. Yes, sir.

Q. And they do not connect up?

A. Sir, they are delineated in red except where they are the same.

Q. The same?

A. Yes, sir, which would be this line around here (indicating).

The Court:

All right.

(Witness excused.)

JOSEPH NADON, JR. a witness for the Defendant, having first been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Grambling:

Q. Will you state your name to the Court?

A. Joseph Nadon, Jr.

Q. Were do you reside, Mr. Nadon?

A. In the City of El Paso.

Q. How long have you resided here?

A. Since September, 1953.

Q. Are you connected with the City of El Paso at this time?

A. I am.

Q. In what capacity?

A. As City Traffic Engineer.

Q. What experience or what are your duties as City Traffic Engineer?

A. To supervise the installation of all traffic control devices. To recommend to the Mayor and Council the regulation of traffic by ordinance and policy.

Q. What experience have you had in this type of work?

A. I attended the University of Michigan, the University of Arizona, and post-graduate course in Traffic Engineering; five years as Assistant Traffic Engineer for the City of Tucson and Pima County, Arizona; and now one year here in El Paso.

Q. Mr. Nadon, are you familiar generally with the traffic conditions in the vicinity of what is known as the Franklin Canal in the City of El Paso on 8th Street?

A. Generally I am, yes, sir.

Q. You are familiar with that Canal and the structures across the street intersections?

A. Yes, sir.

(At this point a photograph was marked for identification as Defendant's Exhibit No. 38.)

Q. I hand you herewith Defendant's Exhibit 38. Will you state what that photograph exhibit is, please?

A. This is a photograph looking South across the Franklin Canal as it intersects Concepcion Avenue.

Q. Now, where is Concepcion Avenue in the City of El Paso? Is it on the East Side or—

A. It is on the East side in the area popularly known as "Del Camino."

Q. Down here near Del Camino Courts?

A. Yes, sir.

Q. And is that an accurate picture of it?

A. Yes, sir, it is.

Mr. Grambling:

We offer Exhibit 38 in evidence.

("D-38" was admitted in evidence and same is to be transmitted as an original exhibit to Court of Appeals by order of the trial Court.)

Q. Now, what is the nature of the structure across the canal at that point, Mr. Nadon?

A. That is a 29-foot street across the canal itself. The bridge structure is a timber structure, and there is a sign on the fence protecting the canal which sets forth a 3-ton gross load limit. The sign reads "By order of the Chief of Police of Ascarate."

Q. Now, is that limit—are you familiar with that structure?

A. Structurally, no, sir.

Q. Now, is that limit placed on there a reasonable limit in your opinion?

A. No, sir.

Q. You don't think it is a reasonable limit?

A. No, sir.

Q. What would be a reasonable limit?

A. The reasonable load limit on any street in the City of El Paso I would say would be the same load limit as is required by the State Highway Department for roads carrying urban type of traffic.

Q. You know what load limit is?

A. Specifically I do not.

The Court:

Let me see. I am not sure I understand this witness. I am not sure I understand his meaning. Is he speaking about a reasonable load limit in relation to this particular bridge or what he thinks its capacity ought to be.

Q. That is what I want to know. Are you referring to the particular bridge or what its capacity ought to be?

A. On a specific load limit, I don't feel personally qualified to make any statement as to the definite load limits which should be applied other than a general statement of what they should in relation to the overall traffic pattern.

Mr. Grambling:

We will show that by the City Engineer, Your Honor.

(At this point another photograph was marked for identification as Defendant's Exhibit No. 39.)

Q. Now, will you tell us what that exhibit there is?

A This is a picture looking Eastward on 4th Street showing the structure across the Franklin Canal as it intersects that street.

Q. Describe that structure to us, if you will.

A. If I may refer to these notes—

Q. Yes.

A. That's a 19-foot wide bridge between the low guards that you see along there. They are about 2x4 wood rails. The bridge is forty feet long and is located on the end of a slight curve on 4th Street. As you can see, it has no guard railings and the sight around that curve is rather poor.

Q. How does the width of the bridge compare with the width of the street?

A. The street around that point is unimproved, that is a graded dirt street, which is very difficult to measure although the street is approximately 24 feet, and the structure—

Q. And the structure is how wide?
A. The structure itself is 19 feet wide.

Mr. Grambling:
We offer in evidence Defendant's Exhibit No. 39.

("D-39" was admitted in evidence and same is to be transmitted as an original exhibit to Court of Appeals by order of the trial Court.)

(At this point another photograph was marked for identification as Defendant's Exhibit No. 40.).

Q. Will you refer to Exhibit No. 40 and tell us what that exhibit is?
A. This is a picture looking South on Eucalyptus Street as it intersects the Franklin Canal.
Q. What is the nature of the structure at that street?
A. At that point the bridge over the Canal has a 25-ft. roadway and has two four-feet-wide board sidewalks on each side of that roadway. The street approaching the bridge from the North, as you are looking there, is 43 feet wide. The street on the South side of the bridge, which you do not see here because of the sight distance, is 32 feet wide.
Q. How wide is the structure?
A. The overall structure is 36 feet.

At this point a recess was had from 10:30 o'clock A.M. until 10:40 o'clock A.M. the same day, at which time proceedings were resumed as follows:

Mr. Grambling:
We would like to offer in evidence Defendant's Exhibit No. 40.

("D-40" was admitted in evidence and same is to be transmitted as an original exhibit to Court of Appeals by order of the trial Court.)

(At this point another photograph was marked for identification as Defendant's Exhibit No. 41.)

Q. I believe you have in your hands now a photograph marked as Defendant's Exhibit No. 41. Will you tell us what that is, briefly, Mr. Nadon?

A. This is a photograph looking South on Mesa Avenue at the bridge over the Franklin Canal.

Q. What is the width of the bridge at that point?

A. The overall width of the bridge is 45 feet. However, in that 45 feet there is an open bed single railroad track, with an approximately five foot board sidewalk on the West side, which is the side that we see in this photograph. There is a concrete sidewalk on the East side, and of the total street width available to vehicular traffic only 21 feet is available, and all on the East side of the structure.

Q. Well, is that structure sufficient in size to carry the traffic that is required at that location?

A. That particular structure is in my mind and in my opinion exceedingly hazardous to vehicular traffic because of the presence of the railroad track as it is.

Q. Is that due to the fact the railroad track is practically in the center of the structure?

A. Partially that, but mainly because that is an open bed track. While it doesn't show too clearly in that photograph, all traffic traveling South over that structure must travel on the lanes which would normally be available to Northbound traffic. In other words, they must drive on the wrong side of the road.

Mr. Grambling:

We offer in evidence Defendant's Exhibit No. 41.

("D-41" was admitted in evidence and same is to be transmitted as an original exhibit to Court of Appeals by order of the trial Court.)

(At this point another photograph was marked for identification as Defendant's Exhibit No. 42.)

Q. Now, Mr. Nadon, you have in your hand Defendant's Exhibit No. 42. Will you tell us what that is?

A. This is a photograph of the intersection of Oregon Street with the Franklin Canal, again looking South.

Q. What is the size of that structure there?

A. This structure is 32 feet wide, for the full width of the structure across the canal.

Q. What is the width of the street on that point?

A. The street width from curb to curb is fifty feet.

Q. Is there considerable traffic that passes across that structure?

A. I would say a normal amount for a residential street. We have no exact counts on these.

Q. In your opinion is that structure sufficiently wide, sufficient in size, to carry the traffic required?

A. Not in complete safety.

Q. Should it be the full width of the street?

A. It should be the full width of the street itself.

Mr. Grambling:

We offer in evidence Defendant's Exhibit No. 42.

("D-42" was admitted in evidence and same is to be transmitted as an original exhibit to Court of Appeals by order of the trial Court.)

(At this point another photograph was marked for identification as Defendant's Exhibit No. 43.)

Q. You have before you Defendant's Exhibit No. 43. Will you tell us what that exhibit is?

A. This is a photograph looking North at the intersection of the Franklin Canal with Raynor Street.

Q. What is the width of the structure there?

A. Between the face of the railings shown on this photograph there is 17 feet clear for vehicular and pedestrian traffic.

Q. What is the width of the street at that point?

A. The street on either side of the structure is 40 feet wide.

Q. Is the structure wide enough to meet traffic conditions with reasonable safety and accomplishment?

A. No, sir.

Q. How wide should it be?

A. The street should be at least—you mean the structure?

Q. Yes.

A. The structure should be at least the width of the street on either side, and in this particular instance there should be of necessity sidewalks for the school children who attend Beall School just North of this intersection.

Mr. Grambling:

We offer in evidence Defendant's Exhibit No. 43

("D-43" was admitted in evidence and same is to be transmitted as an original exhibit to Court of Appeals by order of the trial Court.)

(At this point another photograph was marked for identification as Defendant's Exhibit No. 44.)

Q. Mr. Nadon, you have before you Defendant's Exhibit No. 44. Will you explain what that exhibit is?
A. This is a photograph of the intersection of the Franklin Canal with Piedras Street looking North.
Q. What is the width of the structure there?
A. The width of the street over the structure is 50 feet.
Q. What is the width of the structure?
A. The structure would be—I would have to hazard a guess at that, judging from the—
Q. As wide as the street, is it?
A. The structure is not—well, it is the same width as the street.
Q. In your opinion is that structure safe?
A. Yes, sir.
Q. You know who built that structure?
A. I am informed that it was built by the City of El Paso.

Mr. Grambling:
We offer in evidence Defendant's Exhibit No. 44.

("D-44" was admitted in evidence and same is to be transmitted as an original exhibit to Court of Appeals by order of the trial Court.)

(At this point another photograph was marked for identification as Defendant's Exhibit No. 45.)

Q. Mr. Nadon, you have in your hand Defendant's Exhibit No. 45. What is that?

A. This is a photograph of the intersection of South El Paso Street with the Franklin Canal at 8th Street.

Q. South El Paso Street?

A. Yes, sir.

Q. What is the nature of the structure there. What is the width of it?

A. The width of the bridge is 42 feet.

Q. How wide is the street there?

A. On either side of the bridge the street is 50 feet wide.

Q. Is the structure sufficiently wide to accommodate the traffic requirements?

A. No, sir.

Q. How wide should it be?

A. The entire width available to vehicular traffic should at least be equal to the street on either side. In this case out of 42-ft. width we also have a railroad track.

Mr. Grambling:

We offer in evidence Defendant's Exhibit No. 45.

("D-45" was admitted in evidence and same is to be transmitted as an original exhibit to Court of Appeals by order of the trial Court.)

(At this point another photograph was marked for identification as Defendant's Exhibit No. 46.)

Q. Mr. Nadon, you have before you Defendant's Exhibit No. 46. Will you tell us what that is?

A. This is a photograph of the conjunction of East San Antonio Street with the Franklin Canal.

Q. Is there a structure there across the Canal?

A. There is a structure there which leads to the rear entrance of Darbyshire Steel Company which was sometimes used by them as a truck route in and out of their factory.

Q. Is that a public highway or is it a private road?

A. I do not know. I believe it to be a private road.

Q. Have you any comment to make with reference to that structure?

A. The structure is being used now as an exit from the Darbyshire Steel Company parking lot for the movement of passenger vehicles. It would occur to me that it was rather unsafe inasmuch as it is a right-angle turn from San Antonio Street, and an almost equal right-angle turn immediately on the other side of the bridge, which is not shown on this photograph, into the parking area.

Mr. Grambling:

We offer in evidence Defendant's Exhibit No. 46.)

("D-46" was admitted in evidence and same is to be transmitted as an original exhibit to Court of Appeals by order of the trial Court.)

(At this point another photograph was marked for identification as Defendant's Exhibit No. 47.)

Q. You have Defendant's Exhibit No. 47. Will you tell us what that is?

A. This is a photograph looking South on Boone Street, which is just West of Washington Park, across the Franklin Canal.

Q. Is that structure of the same width as the street on either side?

A. No, sir. It is not. The overall structure is 29 feet wide, with a 21-ft. roadway. The bridge is located on a skew, that is, on an angle to the street. The streets approaching the Franklin Canal are 40 feet wide. At this particular intersection Boone Street divides angling to the West over the bridge and to the East into Washington Park. There are 3-ft. wide pedestrian walks on either side of this bridge protected by this guard rail as you see here.

Q. You know who built this structure?

A. I do not.

Q. Is that structure wide enough to meet the traffic requirements?

A. No, sir.

Q. How wide should it be?

A. It should be at least the width of the street itself.

Mr. Grambling:

We offer in evidence Defendant's Exhibit No. 47.

("D-47" was admitted in evidence and same is to be transmitted as an original exhibit to Court of Appeals by order of the trial Court.)

(At this point another photograph was marked for identification as Defendant's Exhibit No. 48.)

Q. Mr. Nadon, I hand you herewith Defendant's Exhibit 48. Will you tell us what that exhibit is?

A. This is a view from San Antonio Street looking South along the Franklin Canal parallel to a railroad track.

Q. Where is that view taken?

A. This is taken in the same place as the photograph showing the San Antonio Street crossing.

Q. What is that structure on the right, that large structure there?

A. You mean this structure here? (Indicating.)

Q. Yes, sir?

A. I frankly do not know. I believe it to be a part of Darbyshire Steel but I am not positive.

Q. Is the Canal fenced at that point?

A. It is not.

Q. The photograph shows there is no fence at that point in the Canal, is that right?

A. That is right.

Mr. Grambling:

We offer in evidence Defendant's Exhibit No. 48.

("D-48" was admitted in evidence and same is to be transmitted as an original exhibit to Court of Appeals by order of the trial Court.)

Q. Mr. Nadon, is there an open used street along each side of the Canal, the Franklin Canal, from about Santa Fe Street down to about Cotton Avenue?

A. There is, yes, sir. It extends from Santa Fe Street to Park Street.

Q. Is that paved or unpaved?

A. Portions of it are paved, portions of it are not.

Q. Is it used by vehicular traffic?

A. It is.

Q. Are you able to travel down all of that street along the side of the Franklin Canal from Santa Fe Street to Cotton Avenue in such condition that you can—

A. You can but only at the risk of your car.

Q. That is 8th Street you are talking about?

A. That is 8th Street, yes, sir.

Mr. Grambling:

Pass the witness.

On Cross Examination.

Questions by Mr. Edwards:

Q. You say you can travel along 8th Street at the risk of your car. That is because the City hasn't paved it, isn't it?

A. The road is in very rough condition for the most part.

Q. Yes, but there is room between the Canal fence and the curb for the City to pave a street that's wide enough for a car to travel over if the City cared to pave the street, isn't there?

A. Between the adjacent curbings on either side of the Canal there is a ten-foot strip, approximately. In other words, a ten-foot roadway.

Q. And it is unpaved because the City hasn't required it to be paved at those points, isn't that a fact?

A. I wouldn't be qualified to say why it wasn't paved.

Q. Mr. Nadon, going back to your exhibit on Concepcion Avenue—let me see, which one was that? Exhibit 38. You recall the photograph that you offered there showing a view South across the Canal at Concepción Avenue?

A. Yes, sir.

Q. It is a fact, isn't it, that that Street wasn't opened up until about four years ago and that bridge was built by a Mr. Lanier and a Mr. Adams and was taken over by the town of Ascarate while—

A. I don't know. That was before I came to El Paso.

Q. Well, will you verify that and report back to us as to when that street was opened up and when that bridge was built there at Concepcion Avenue and when it was opened? Now, Exhibit 41 shows a view South—

Mr. Grambling:
Mr. Hervey is going to testify. You can get that from him.

Mr. Edwards:
Oh, he's all right.

Q. This Exhibit 41, which you say is looking South on Mesa Avenue. Now, it was the City that granted the franchise for that railroad track across there, wasn't it?

A. I would assume so.

Q. Yes, sir, and the same is true on Exhibit 48, looking South at San Antonio (shows to witness). The City granted the railroad a franchise there too?

A. To cross the Canal and the street. However, the railroad crossing on the street has no effect.

Q. And that is a railroad structure that is shown there?

A. In all likelihood.

Q. Well, did you make the picture?

A. I had the picture made.

Q. Were you present?

A. Yes.

Q. Well, isn't that a railroad structure?

A. I believe so.

Q. And Exhibit 46, which is the conjunction of East San Antonio and the Canal. That is a private roadway, isn't it? That is not a public street at all, is it?

A. I believe San Antonio to be a dedicated street all the way.

Q. This portion that you are talking about here?

A. I believe that to be a dedicated street.

Q. Well, do you know whether it is or do you know whether it is a private roadway?

A. I believe it is.

Q. Can you get that information?

A. I will get that information.

Mr. Edwards:

That is all.

On Re-Direct Examination.

Questions by Mr. Grambling:

Q. Mr. Nadon, Mr. Edwards asked you about the City granting a franchise for the railroads there on those two pictures you have seen?

A. Yes, sir.

Q. Isn't a fact that those railroads were built until 1881, many years before the Franklin Canal, wasn't it?

A. I don't know, sir.

Mr. Grambling:

No further questions.

(Witness excused.)

No. [redacted] 198

VOLUME III.

TRANSCRIPT OF RECORD.

Office - Supreme Court, U.S.
FILED
JUN 17 1957
JOHN T. FEY, Clerk

UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT.

No. 15,954

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, ET AL.,

Appellants & Cross-Appellees,

versus

CITY OF EL PASO,

Appellee & Cross-Appellant,

(AND REVERSE TITLE).

Appeal & Cross-Appeal from the United States District Court for the Western District of Texas.

(ORIGINAL RECORD RECEIVED FEB. 16/56.)

MAYOR FRED HERVEY, a witness for the Defendant, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Grambling:

Q. Mr. Hervey, will you state your name to the Court?

A. Fred Hervey.

Q. Are you Mayor of the City of El Paso?

A. Yes, sir.

Q. How long have you been Mayor of the City of El Paso?

A. Since April, 1951.

Q. Mr. Hervey, have you kept yourself informed as to the condition of the structures across the Franklin Canal during the time you have been Mayor?

A. Pretty well, yes, sir.

Q. And have you from time to time observed those structures?

A. I have.

Q. You have made it a habit, have you not, Mr. Hervey, to go out and observe certain properties in which the City has an interest during the time you have been Mayor, haven't you?

A. That is right.

Q. Mr. Hervey, did the City construct at its own cost certain facilities, certain structures, across the Franklin Canal?

A. We did.

Q. When were they constructed?

A. Well, I don't have—

Q. Can you tell us the year?

A. Well, it has been about a year, a little over a year ago.

Q. What streets were those structures on?

A. Piedras Street, Copia Street and Verde Street.

Q. Piedras Street, Copia Street and Verde Street?

A. That is right.

Q. Now, why was it necessary, in your opinion, for the City to construct those structures?

A. Piedras Street is an arterial street of the City of El Paso, and the bridge over the Canal at Piedras Street was a small wooden bridge that was inadequate for the crossing of traffic at that point, and in order to open it up for the use of people to the North side coming down Paisano Drive to the North side of the City, it was necessary to put in a bridge that would be adequate. On Copia, which is also an arterial street, there was no bridge at all, and in order to facilitate the movement of traffic up Copia Street we had to build a bridge at Copia Street. At Verde Street, which has also become an arterial street, it had a small wooden bridge, and not only was it small but it was humped up and very inadequate for the crossing of traffic, and it was necessary to build a bridge wide enough for traffic to move over it.

Q. And the City did actually build bridges or have them built across those three arterial streets where they intersect the Franklin Canal?

A. That is right, at a cost of $51,560.53.

Q. Mr. Hervey, how do you arrive at that cost? Did you just go out and build them yourselves or what did you do?

A. No. The Engineering Department drew up specifications and we had a bid notice and we got the bids from several contractors, and R. E. McKee

was the lowest, and that was the best bid and we took that bid.

Q. In your judgment was the cost which the City paid for the construction of those three bridges reasonable and necessary for building those bridges?

A. Yes. We thought we got a very good price. Those bridges were so important to the City of El Paso that Congressman Regan introduced a bill in Congress to appropriate money by Congress to install I forget how many bridges, quite a number of bridges, at the cost of the Federal Government, which never got passed; but certainly we needed those bridges very badly and those three were put in at the taxpayers' expense by the City of El Paso.

Q. Was it necessary to have those bridges for the traffic to properly cross the Canal there with reasonable safety and reasonable dispatch?

A. Very necessary.

Q. Did you make any demand upon anybody before you built those bridges yourselves, or the City build them, and request that they build then?

A. There was. The subject of bridges across the Canal was quite a topic of conversation and quite a matter of conjecture as to who was going to pay for them, as I said, before Congressman Regan introduced a bill into Congress to try to get the bridges paid for by the United States Government. I think in the original granting of the right to move the Canal across the town, the middle of the town, that certainly no thought was given that the City of El Paso would in years to come be put to several thousand dollars worth of expense for them to cross a Canal that was—

Mr. Edwards:

Just a minute. He will object to this string of conclusions on the part of the witness.

The Court:

Yes. I think the question inquired into was whether any demand was made by the City on somebody else about putting in these bridges.

Q. I will limit it to that. Was any demand made on the El Paso County Water Improvement District Number One?

A. We made demand on the El Paso Improvement Company.

Q. You mean the El Paso County Water Improvement District Number One?

A. Yes, and the Bureau of Reclamation.

Q. To construct these bridges?

A. To construct the bridges.

Q. And did they refuse to go forward with it and do the work?

A. They did.

Q. And it was only then that the City went ahead and did the work, is that right?

A. I can't remember whether we—I don't believe we ever made any request in writing, but we did make a request that they pay for the bridges.

Q. And they refused to do so?

A. That is right.

Mr. Grambling:

Pass the witness.

On Cross Examination.

Questions by Mr. Edwards:

Q. Mr. Hervey, you speak of the bridge having been built by the City at Piedras Street. The reason or your reason for doing that was simply because you desired a more modern structure than the one that was there, isn't that a fact?

A. We desired a new bridge because the other one was inadequate.

Q. Well, now, I think that is a conclusion too. The bridge that was there had been kept in repair, had it not?

A. Reasonably so.

Q. Yes. You just wanted a different bridge?

A. We wanted a wider bridge.

Q. Yes. And at Copia Street, where you put the bridge across, there never had been a bridge there?

A. Never had been.

Q. Never had been?

A. But one was very badly needed.

Q. From the time the Canal was built in 1889 until you put this one up there, there never had been one there?

A. Never had been.

Q. And on Verde Street, you had the same situation as the one on Piedras Street. You simply wanted a more modern structure?

A. Just—well, the one on Verde Street—

Q. Will you just answer my question "yes" or "no"?

The Court:

He is entitled to some latitude of explanation.

A. The one on Verde Street was humped. It went up and came down, and it was a very inadequate bridge because of that reason, besides being very narrow and in order to get traffic over Verde, up Verde and up into the new Loretto Additions, it had to be widened. There was no alternative.

Q. Now, Mr. Hervey, let me refresh your recollection. The bridge wasn't humped. The streets were lower on each side of the bridge, isn't that a fact?

A. Well, I will agree with you that the streets were lower on each side of the bridge, but that still provided a hump.

Q. All right, but there wasn't any hump on the bridge, was there?

A. Yes, there was. Looking down from the bridge there was a hump.

Q. If the street had been built to the level of the top of the Canal then there wouldn't have been any hump there, would there?

A. If what?

Q. If the street had been raised, the level of the street had been raised to the level of the top of the Canal?

A Will, you se, Alameda—

Q. I am talking about Verde?

A. Alameda Street, which is the next street North of Paisano Drive, we'll say is two feet or three feet lower than the Canal. Now, if the street had gone all the way up, which would have put houses down into a well or a gully, we'll say, because of the street, then we would have been able to have made the street even with the Canal.

Q. Let me get at it another way. You object to that word "hump". Suppose we forget about that, instead of deciding whether the bridge was humped, it

is a fact, then that the street had sagged, isn't that right?

A. Well, Paisano Drive—

Q. I am talking about Verde?

A. Well, yes. Verde crosses Paisano. Paisano Drive is this way (indicating) and the Canal is this way (indicating). Now, in order to get a street over the Canal, you can do it one or two ways. You can come over like that (indicating) or you can cut part of the top of the Canal off and make it level. We made it level. The other bridge had a hump.

Q. Mr. Hervey, Paisano Drive is built below the level of the Canal, isn't it?

A. That is right, below the top of the Canal.

Q. And it was built many many years after the Canal was, isn't that a fact?

A. That is right.

Mr. Edwards:

That is all.

On Re-Direct Examination.

Questions by Mr. Grambling:

Q Mr. Hervey, was there any way for traffic to cross the Canal at Copia Street until you built this bridge?

A. None whatsoever.

Q. And is that one of the thoroughfares or one of the busiest streets of El Paso?

A. One of the busiest streets in El Paso is Copia Street.

Q. Does it run a long distance?

A. Runs a long distance.

Q. From the river on up?

A. On up to the Northern part of the City.

Q. It is one of the larger streets?

A. It is one of the most important streets in the City.

Q. There is testimony here, which you heard, in which Mr. Nadon was asked about whether the City didn't grant a permit for the railroad tracks, one at South El Paso Street and I forget the other location, there in the same vicinity. You know whether the railroads were built first or whether the Canal was built first?

A. The railroads were built first.

Q. They were built in 1881?

Mr. Edwards:

Just a minute. I think it is a matter of general history that the railroads were not built into El Paso at all until 1881, and I think that these spur tracks out there were built many years after that.

A. Anyway, it was before I was born, so I wouldn't know.

Q. Mr. Hervey, are you familiar with the traffic that goes across the Canal in the various downtown streets, such as El Paso Street, or Mesa Avenue, Stanton Street, and other streets?

A. Sure am.

Q. I will ask you whether or not in your opinion the structures across the Canal are sufficient in those areas to take care of the traffic that goes across those streets?

A. They are not because they are narrower than the streets. In my estimation they are not adequate and not in keeping with the streets.

Q. Well, do they present a traffic hazard where you have them narrower than the width of the street?

A. That is right.

Mr. Grambling:

Pass the witness.

On Re-Cross Examination.

Questions by Mr. Edwards:

Q. Again, there you just want more modern structures. That is right, isn't it?

A. Well, Mr. Edwards, when you have a bridge built for the horse and buggy—

Q. Wait just a minute—

A. A horse and buggy is entirely different from the automobile and we certainly need wider bridges.

Q. Do you mind answering my question? What you want is more modern structures than what are there?

A. We want adequate tructures and also modern structures.

Q. You want adequate and modern structures?

A. That is right.

Q. In other words, you want something different from what has been kept up and maintained all along?

A. We cannot keep—

Q. Will you answer my question, please?

A. We cannot keep—

Q. Will you answer my question, Mr. Hervey?

A. We cannot keep structures that are inadequate.

Mr. Edwards:

I think the witness should answer my question.

The Court:

I think the last question, Mr. Hervey, is one that doesn't require a whole lot of elaboration.

A. Repeat the question.

(Reporter reads): "Q. In other words, you want something different from what has been kept up and maintained all along?"

A. We want something entirely different.

Q. Now, getting back to that Exhibit 38, which was identified by Mr. Nadon as being the photograph looking South across the Canal at Concepcion Avenue (indicating). I will ask you if that bridge wasn't one that was built about four years ago at a place where there never had been one before, by Mr. Lanier and Mr. Adams, and was later taken over by the town of Ascarate during its existence?

A. That is my understanding, yes, sir. You can see the hump in this one, goes up and comes down.

Q. Will you speak to Mr. Adams or Mr. Lanier about that hump?

Mr. Edwards:

That is all.

The Court:

Which one is that one you were just talking about?

Mr. Grambling:

Exhibit 38, Your Honor.

The Court:

Now, are the streets you have been talking about, where you say there should be better bridges, all paved in the vicinity of the Canal crossing?

The Witness:

Well, in the case of Piedras Street, it was all paved, and when we came to the bridge, it was a smaller structure and it created the fact that we had

to widen it. Now, in the case of Copia Street, it was not paved; and we not only had to put in a new bridge but we did have to connect up with other paving also. And in the case of Verde Street, it was paved up to the bridge on both sides.

The Court:

Now, there are some four or five others that Mr. Grambling mentioned a while ago that are down in the business section, I presume. What about those streets in the vicinity of the canal crossing?

The Witness:

I think you will find some of them are paved and some of them are not. I think they are all in the process now of being paved, but there are a few that are not paved. I don't know exactly how many, but one or two I think.

On Re-Direct Examination.

Questions by Mr. Grambling:

Q. Just one question. You started to answer it and Mr. Edwards objected to your answer. You were going to tell us why in your opinion those structures were not adequate. Would you mind doing that?

A. Well, the main problem is that they are not wide enough to adequately permit traffic to move backwards and forwards in both directions. The bridges, of course, are all of different widths. Some of them, you have a hard time getting one car over them at a time; and some of them will permit two cars to pass going either way but at very close quarters; so that when you get modern traffic and try to move modern traffic you are not going to be able to

move them across a bridge that was built for horse and buggies.

Q. Now, some of them have load limit, do they not, showing what the limit is?

A. They are all wooden bridges—

Q. But—

A. And they have a load limit on them.

Q. Have you seen those load limits?

A. I have seen them but I can't recall what it is.

Mr. Grambling:
That is all.

Mr. Edwards:
That is all.

(Witness excused.)

NICOLAS PEREZ, JR., a witness for the Defendant, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Grambling:

Q. State your name, please, sir.

A. Nicholas Perez, Jr.

Q. Where d oyou live?

A. El Paso, Texas.

Q. Are you Chief Engineer for the City of El Paso at this time?

A. I am the City Engineer for the City of El Paso

Q. Mr. Perez, what technical training have you had?

A. I have a B.S. Degree from the Texas College of Mines in Mining Engineering, Metallurgy and Geology. I practiced that profession until 1941. At that time I entered the Army and I served in the Corps of Engineers until 1946. At the time of my discharge I was Battery Commander. In 1946 I entered the University of Texas and obtained a Master of Science Degree in Civil Engineering. After my graduation from the University I went to work for the Highway Department and I worked for them until October 1 1954, at which time I accepted the job I now have.

Q. '54, did you say?

A. Yes, sir.

Q. That was this October?

A. Yes, sir.

Q. Mr. Perez, are you a registered Civil Engineer?

A. I am in Texas.

Q. I mean in Texas. Are you familiar with the bridges that are across the Franklin Canal as it runs down 8th Street in the City of El Paso?

A. From visual inspection only.

Q. By visual inspection only?

A. That is right.

Q. Now, some of those bridges have limitations of load limit that they can carry?

A. They do.

Q. Do you know what those load limits are?

A. Yes, sir. You want me to name each one specifically?

Q. Yes, sir?

A. Maximum or minimum?

Q. The maximum of each one.

A. Hill Street: five tons gross, 8,000 pounds on the axle.

Q. Now, is that sufficient to accommodate all types of traffic that would use that bridge?

A. No, sir.

Q. What traffic would it not accommodate?

A. It would not accommodate even the minimum required by the Texas Highway Department, which is an H-10 loading, which would mean 20,000 pounds total.

Q. And this is five tons, which would be 10,000 pounds?

A. That is right.

Q. And 20,000 pounds is the minimum requirement?

A. That is the minimum on the suburban roads, their farm-to-market roads, where traffic is very light.

Q. All right. Then what is the next one that has a load limit?

A. East 4th Street, approximately the 1800 Block 3 tons gross, 4800 pounds on the axle.

Q. Would that be sufficient to meet the requirements of traffic using that bridge?

A. No, sir. That is an industrial area and in my opinion the modern trailers and trucks would not be able to cross there safely.

Q. How about a bus? How much does one of these City buses weigh, do you know?

A. The heavy City bus, loaded with passengers, has a load of 23,750 pounds.

Q. Now, go right ahead. What about Eucalpytus, is there any sign limit there?

A. Eucalyptus Street: 5 tons gross, 8,000 pounds on the axle.

Q. Is that sufficient to meet the traffic requirements at that point?

A. No, sir.

Q. How much should it be, the minimum of the Highway Department?

A. I believe that Eucalyptus is located near Darbyshire Steel, which is a foundry, and I believe that the minimum on any of these bridges should be at least an H-20.

Q. How much is that?

A. 40,000 pounds.

Q. Now Raynor Street?

A. Raynor Street: 5 tons gross. 8,000 pounds on the axle.

Q. Is that sufficient to meet the traffic requirements?

A. No, sir. All these are under this minimum limit so I consider them inadequate.

Q. You think they all should be up to the minimum limit of ten 'ons, is that right?

A. I think they all should be up to at least H-20 in the city.

Q. What is that?

A. 40,000 pounds.

Q. And how about Estrella Street?

A. 5 tons gross. 8,000 pounds on the axle.

Q. That is below the minimum limit?

A. That is right.

Q. Stevens Street?

A. There is another in between. Grama.

Q. Grama Street, yes.

A. 5 tons gross; 8,000 pounds on the axle.

Q. That is too small also?

A. Yes, sir. That is under the limit.

Q. Copia Street, there is no limit there?

A. There is no limit there.

Q. Who built that bridge?

A. I believe that is one of the bridges that was built by the City of El Paso.

Q. Stevens Street?

A. Seven tons gross; 11,000 pounds on the axle.

Q. Is that heavy enough?

A. Not heavy enough.

Q. How about Hammett?

A. Seven tons gross; 11,000 pounds on the axle.

Q. Is that sufficient?

A. No, sir.

Q. Boone Street?

S. Seven tons gross; 11,000 pounds on the axle.

Q. Is that sufficient?

A. It is under the limit.

Q. Washington Park, West Entrance?

A. Five tons gross; 8,000 pounds on the axle.

Q. Is that sufficient?

A. That is a park. I don't know whether we would require commercial vehicles to go in there, so for passenger traffic it probably should meet at least a 10-ton requirement, which this is under.

Q. And the same applies to the East Entrance?

A. The East Entrance is lower, that is 3 tons gross and 4000 pounds on the axle.

Q. Tobin Place?

A. Three tons; that is 3 tons gross and 4000 pounds on the axle.

Q. Is that insufficient?

A. Yes, under the limit.

Q. The Alley between Hadlock and Edson?

A. Three tons gross; 4800 pounds on the axle.

Q. Do they use that for traffic, heavy traffic?

A. It is wide enough for heavy traffic. I haven't seen any traffic going over. If it did carry a single vehicle it would be insufficient, other than just light passenger.

Q. How about Concepcion Street?

A. These load limits are U. S. Bureau of Reclamation load limits. The bridge at Concepcion Street does not have a Bureau of Reclamation load limit sign on it. The sign that exists there is a sign by the Chief of Police of Ascarate. That is 3 tons gross. No axle limit given.

Q. Now, how about these other sign limits, who put those up there?

A. They are U. S. Bureau of Reclamation signs.

Q. And put up for warning to the public?

A. Yes, sir.

Q. Do the width of these bridges and the nature of their construction comply with the State Highway Department requirements, or do you know?

A. You mean comparable structures on the highway?

Q. Yes, sir?

A. No, they wouldn't. Not for load limit they wouldn't.

Q. Well, how about width?

A. No, sir.

Mr. Grambling:

Pass the witness.

On Cross Examination

Questions by Mr. Edwards:

Q. Mr. Perez, when were these H-20 loading requirements adopted by the Texas Highway Department?

A. I didn't say they were adopted by the Highway Department.

Q. Well, you said some requirement of the Highway Department?

A. The Highway Department set their load limits on their structures as adopted by the specifications put out by the A.S.H.O., which is the Association of State Highway Officials.

Q. Well, I want you to tell me when the Highway Department first made these requirements?

A. I don't know.

Q. Well, you do know that the Highway Department didn't come into existence until many many years after that Canal was built, don't you?

A. From history, yes.

Q. And you don't know when the requirements were made about the H-10 loads either, do you?

A. By whom?

Q. You spoke of H-10 and H-20 loads?

A. Yes, sir.

Q. Was that at the same time?

A. Same time as what?

Q. The same time as H-20 loads?

A. Adopted by the Highway Department? I don't know.

Q. But you do know the alleged incapacity of these bridges as complained of by the City is caused by the nature of the basic structure of the bridge itself rather than its condition of repair, don't you?

A. Well, the structure—

Q. Just answer my question.

A. Will you please repeat the question?

(The question was repeated by the Reporter.)

A. Yes.

Q. All right. Well, Mr. Perez, as an Engineer, you do know generally about when these H-10 and H-20 loadings became generally accepted by highway engineers, don't you?

A. The ones that are now effective are from 1944.
Q. 1944, all right.

Mr. Edwards:
That is all.

On Re-Direct Examination.

Questions by Mr. Grambling:
Q. And they were put in because they were necessary in view of modern traffic conditions and modern traffic vehicles, were they not?
A. Yes, sir. They are the latest, to meet up with present day traffic.

Mr. Grambling:
That is all.

(Witness excused.)

Note

Page 1246 (large map) is on Card 22.

"D-50".

An Ordinance to Provide For the Regulation and Government of the Streets, Alleys, and Ways in the City of El Paso.

Section 1. Be it ordained by the City Council of the City of El Paso; That any person who shall hereafter obstruct any street, alley, way or place of said city (said streets and alleys being the same which are laid down in a map drawn by Anson Mills for the proprietors of the town of El Paso in 1858 and which is hereby adopted) by erecting a building or by obstructing in any manner said streets, alleys, ways or places shall be guilty of a misdemeanor and shall upon conviction be fined in a sum not less than five dollars nor more than twenty dollars and in case of non-payment shall be imprisoned for a period not to exceed five days.

Section 2. That any person who shall construct any ditch or contra acequia or dig any holes in through or across any of the public streets, alleys, or ways or places of the City of El Paso without permission of the Mayor and Council of said City shall be guilty of a misdemeanor and shall upon conviction thereof be fined in a sum not less than one dollar nor more than ten dollars, and in case of non-payment of said fine to imprisonment for a period not to exceed five days.

Section 3. Any obstruction placed in any of the streets, alleys or public places of said City shall be removed by the City Marshal by direction of the Mayor, and at the expense of the party causing and continuing the same.

Section 4. Any person or persons who now have inclosed and and are occupying any portion of the streets, alleys or places of said city shall upon thirty days notice by order of the Mayor and City Council cause the same to be opened and remove all obstructions, and upon failure to comply with said notice shall be deemed guilty of a misdemeanor and upon conviction thereof be fined in a sum not less than five dollars nor more than twenty dollars and in case of non-payment of said fine to be imprisoned for a period not to exceed five days. And it shall be within the power of the Mayor to cause the removal of the same at the expense of the person or persons so convicted.

Section 5. Any person or persons who shall drive or run any horse or horses or any other animal or animals at a furious rate of speed through the public streets or ways of said City shall be deemed guilty of a misdemeanor and shall upon conviction thereof be fined in a sum not less than one dollar nor more than twenty dollars, and in case of non-payment of said fine to be imprisoned for a period not to exceed five days.

Section 6 That this Ordinance shall take effect from and after its passage and after being posted as required by law.

Approved May 1st. 1874

MAYOR OF EL PASO

11-13-54.

A true and correct copy, I do hereby certify.

(S.) J. M. HERRERA.

City Clerk.

Mr. Guinn:
We would now like to offer—

Mr. Edwards:
Excuse me. In connection with the Mills map, will you agree that these acequias have been nonexistent for many years?

Mr. Guinn:
I don't think—

Mr. Sims:
They are not in existence today.

Mr. Edwards:
That is what I say, they have been nonexistent for many years

Mr. Guinn:
I don't think we can agree on that. I don't know exactly when they went out, but we expect to show the use of the water. If he can find someone who can say definitely when they went out I think we can agree on that date.

The Court:
What he was asking about is that they have been out of existence for many years.

Mr. Guinn:
I don't know what he means by "many". In other words, if he knows of someone who can say how many we will agree to that figure. We know they have been out for sometime but we don't know for how many years.

The Court:
All right, proceed.

Mr. Guinn:
Now we wish to offer the incorporation of the City of El Paso in 1873, and read only several sections therein. (Reporter marks same "D-51") This will be Exhibit No. 51, "An Act to Incorporate the City of El Paso."

Defendant's Exhibit No. 51 was thereupon received in evidence by the Court and reads in words and figures as follows:

"D-51".

Laws of the State of Texas

Chapter CLXXXI.

An Act to Incorporate the City of El Paso.

Section 1. Be it enacted by the Legislature of the State of Texas, That all the inhabitants of the county of El Paso, within the hereinafter described bounds and limits, are hereby constituted a body corporate and politic, with perpetual succession, under the name and style of "The City of El Paso;" and under that name shall have power, first, to sue and be sued; second, to purchase and hold real and personal property for the use of the city, and land for taxes; third, to sell and convey any real or personal estate owned by the city, and make such order respecting the same, as may be conducive to the interest of the city; fourth,

to make all contracts, and do all other acts in relation to the property and concerns of the city, necessary to the exercise of its corporate or administrative powers; fifth, to have a corporate seal.

Sec. 2. That the said corporation shall have jurisdiction over all that territory within the County of El Paso, included within the following described bounds and limits: Commencing on the Rio Grande, at a point five hundred yards north of Hart's mills; thence east to the northwest corner of what is known as the Cummings' survey; thence south, following the west line of the Cummings' survey; to the banks of the Rio Grande; thence west and north, following the banks of said river, to the place of beginning.

Sec. 3. The powers herein granted shall be exercised by the mayor and city council as hereinafter set forth.

Sec. 4. The City of El Paso shall be divided into three wards; the boundaries thereof shall be as follows, until changed by the city council: The first ward shall comprise all that portion of the corporation lying west of the center of El Paso street, and south of the center of San Francisco street. The second ward shall be all that portion of the corporation lying north of the center of San Francisco street, and north of the plaza, the public square, and the center of St. Louis street. The third ward shall be all that portion of the corporation lying west of the center of El Paso street, and south of the plaza, the public square, and the center of St. Louis street; and the boundaries of said wards may be changed, from time to time, by the city council as they may deem ex-

pedient, having regard for the number of inhabitants, so that each ward shall contain, as near as may be, the same number of qualified electors for city elections. New wards may be created by the city council when they may deem it necessary or expedient; provided such increase of wards shall not increase the number of councilmen to more than twelve.

Sec. 5. The elections for city officers under this charter shall be held upon the second Tuesday in August, A. D. 1873. Every male inhabitant of the city who has resided within the city for a period of six months next previous to an election, who is at least twenty-one years of age, a citizen of the United States, or has declared his intention of becoming a citizen of the United States, shall be entitled to register and vote at any city election.

Sec. 6. The mayor and city council shall appoint a registrar, at least twenty days preceding an election for mayor and councilmen, who shall proceed to register the qualified voters of the city in such manner as is prescribed by the general laws of the State regarding the registration of voters. The registrar shall divide his time between the several wards of the city, and shall keep separate lists for each ward, and persons registering shall register in the wards in which they live. The mayor and city council shall act as a board of revision and appeals, and shall be governed by such laws as may be in force in this State regarding boards of appeal and revision. The mayor shall have copies of the revised lists of voters alphabetically arranged for the use of the judges of election in each ward. All the powers given judges of election and registrars by any general law of this State is hereby conferred on such officers of this city.

Sec. 7. The mayor shall give public notice of the holding of an election at least ten days preceding the day of election; and should the mayor fail to give such notice, the city council may order the same.

Sec. 8. At all elections for city officers the voters shall vote by ballot, and only in the wards wherein they respectively reside. Each ward shall constitute an election district, and polls shall be opened at such place therein as may be designated by the mayor or fixed by ordinance; provided, that nothing in this act shall contravene any general law of this State regulating elections. The mayor shall provide suitable rooms and arrangements for polls of election.

Sec. 9. The mayor and city council shall appoint the judges of election for each ward, who shall have power to appoint two clerks to aid them in conducting the election. In case of the failure or refusal of the mayor and city council to act, then the justice of the peace of the precinct in which the city is situated, shall appoint the judges of election. The judges of election shall take and subscribe to such oaths as are required of judges of election by the general laws of the State, and their proceedings shall, in all matters relating to the conduct of the election, be governed by such laws.

Sec. 10. The polls shall be kept open from eight o'clock A. M. to six o'clock P. M. on the day of election. The judges of election shall proceed immediately upon the closing of the polls to count the votes, and such counting shall be conducted in the presence of at least three persons besides the judges of elec-

tion and the clerks, and they shall make return to the returning officers.

Sec. 11. The mayor and city council shall be the returning officers. They shall proceed, within five days after the close of said election, to open the returns and canvass the vote, and the person or persons receiving the highest number of votes shall be declared elected. The returning board shall publish the returns in such manner as may be provided by ordinance, and shall cause notice to be served of said election on the person or persons so elected, on the day following the counting of the returns; and such officers elected shall appear within ten days after receiving such notification, before any officer empowered to administer oaths, and take the oath of office prescribed by the Constitution and laws of this State. In case any officer elected fails to take the oath within the time prescribed, his office shall be vacant.

Sec. 12. When two or more persons shall have received an equal number of votes for the office of mayor or councilmen, a new election shall be ordered, and held in the manner prescribed in this charter; and all cases of contested elections shall be tried and determined by the city council.

Sec. 13. The mayor shall hold his office for a term of two years, and until his successor is duly elected and qualified.

Sec. 14. The city council shall consist of two citizens elected from each ward, to hold their offices for two years and until their successors are qualified; provided, the number of councilmen shall never

exceed twelve. A majority shall constitute a quorum for the transaction of business, but a less number may meet and compel the attendance of absent members.

Sec. 15. The councilmen shall not receive, either directly or indirectly, any salary or other compensation from the city for their services. The mayor shall receive no salary, but may receive such fees as are hereinafter provided.

Sec. 16. Any person who is a qualified voter within said corporation, and who has been an actual resident therein for at least one year preceding the election, shall be eligible to any office created by this act.

Sec. 17. If the mayoralty should become vacant by death, resignation, or removal of the incumbent, a majority of the city council may elect one of their own number mayor, for the time being, to fill the vacancy until his successor is elected and qualified. The mayor may be removed from office for malfeasance in office, by the unanimous vote of all the city council. In case of vacancy in the office of councilman in any ward of the city, the mayor shall order an election in the ward to fill such vacancy.

Sec. 18 The mayor and city councilmen shall constitute the city council of said city. The city council shall meet at such times and places as they shall be resolution direct. The mayor, when present, shall preside at all the meetings of the city council, and shall have in all cases a casting vote. In his absence any one of the aldermen may be appointed to preside, in which case the alderman who presides shall vote as an alderman.

Sec. 19. The city council shall hold regular meetings at stated times, at least once in each month, and the mayor, of his own motion, or on the application of two members of the council, may call special meetings. The meetings of the city council shall be public.

Sec. 20. Petitions and remonstrances may be presented to the council in writing only, and the council shall determine the rules of its own proceedings, and have power to compel the attendance of absent members, and with the concurrence of two-thirds of the members elected, may expel a member.

Sec. 21. The city council shall have the care, management and control of the city and its property and finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this State, and such ordinance to alter, modify or repeal, and shall have power by ordinance:

Sec. 22. To borrow money on the credit of the city and issue bonds therefor to an amount not to exceed twenty thousand dollars. To make a loan, the question must be submitted to the registered voters of the city, and if sustained by a vote of two-thirds of the votes polled, such loan shall be lawful. All bonds shall specify for what purpose they were issued, and shall not be invalid if sold for less than their par value. And when any bonds are issued by the city, a fund shall be provided to pay the interest and two per cent. per annum on the principal, as a sinking fund to redeem the bonds, which fund shall not be diverted or drawn for any other purpose; and the city treasurer shall honor no draft drawn on said

fund, except to pay interest or to redeem the bonds for which it was provided, and for the payment of such loan to levy a special tax, over and above the general tax allowed by this act; provided, the rate of tax shall not exceed one-half of one per cent, and the rate of interest shall not exceed ten per cent; provided, also, no loan shall be made for any other purpose or purposes other than those connected with the corporation of said city; and no loan shall be made to aid any private enterprise, railroad or undertaking not under the management and control of the city council. The sinking fund for the redemption of any loan or debt to be invested as fast as the same accumulates, in United States interest-bearing bonds, bonds of the State of Texas, or in the city bonds, and such bonds, and the interest of said bonds, to be re-invested and to be sold when necessary, to pay debts or loans.

Sec. 23. To provide by ordinance special funds for special purposes, and to make the same disbursable only for the purpose for which the fund was created.

Sec. 24. To appropriate money and to provide for the payment of the debts and expenses of the city.

Sec. 25. To provide the city with water; to make, regulate and establish public wells, pumps, cisterns, fountain, hydrants, reservoirs, in the streets or elsewhere, within the said city, or beyond the limits thereof, for the extinguishment of fires and the convenience of the citizens; and to make, establish and regulate all irrigating ditches, and to have entire control of the same.

Sec. 26. To fill up old ditches, wells, pools, or other places where stagnant water or foul matter may accumulate, to the detriment of the health and convenience of the citizens.

Sec. 27. To make regulations to prevent the introduction of contagious diseases into the city; to make quarantine laws for that purpose, and to enforce the same within five miles of the city.

Sec. 28. To make regulations to secure the general health of the city, and to prevent and remove nuisances, and to make and prescribe regulations for the cleaning and keeping in order all slaughter houses, stock yards, warehouses, stables, privies, or other places where offensive matter is kept or liable to accumulate.

Sec. 29. To establish, regulate and support night-watch and police, and define the duties thereof.

Sec. 30. To provide for the lighting of the streets and the erection of lamp posts; to exclusively regulate, direct and control the laying and repairing the gas pipes and gas fixtures in the streets, alleys, sidewalks, and elsewhere.

Sec. 31. To erect and establish market houses and market places, and to regulate and govern the same; and to provide for the erection of all other useful and necessary buildings for the use of the city, and for the protection and safety of all property belonging to the city, and to provide for the safety and protection of private property where damages are likely to accrue by the action of the elements.

Sec. 32. To provide for the removal of officers of the city for misconduct, and to create any office or employ any agent they may deem necessary for the good government and interest of the city.

Sec. 33. To regulate the police of the city, and to impose fines for the breach of any ordinance, and provide for the recovery and collection thereof, and in default of payment, to provide for confinement in the city prison or workhouse, or to hard labor in the city.

Sec. 34. To regulate and prescribe the duties and powers and compensation of all officers, agents and employees of the city not herein provided for.

Sec. 35. To require of all officers or agents of the city, elected or appointed in pursuance of this act, bonds and security for the faithful performance of their duties.

Sec. 36. To have the exclusive power and control over the streets, alleys, sidewalks, lanes, avenues, and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon; to open, alter, widen, straighten, extend, establish, abolish, regulate, grade, re-grade clean pave macadamize or otherwise improve the same; to put drains and sewers therein, and to prevent the encumbering thereof in any manner, and to protect the same from any encroachments or injury; to regulate the making of sidewalks, their grade, material, and mode of construction when such sidewalks are made by private persons; to alter and establish the channels of any ditches or water courses within the limits of said city, when the health, safety or con-

venience of the city may require such to be done, and to wall up or cover said ditches or canals.

Sec. 37. To establish, erect, construct, regulate and keep in repair, bridges, culverts and sewers, sidewalks and crossways, and to regulate the construction and use of the same, and to abate and punish any obstructions or encroachments therein; and the cost of the construction of sidewalks shall be defrayed by the owners of the lot, or part of lot, or block, fronting on the sidewalk; and the cost of any sidewalk constructed by the city shall be collected, if necessary, by sale of the lot, or part of lot, or block, on which it fronts, together with the cost of collection, in such manner as the city council may, by ordinance, provide; and a sale of any lot, or part of lot, or block, to enforce collection of cost of sidewalk, shall convey a good title to the purchaser, and the balance of the proceeds of sale, after paying the amount due the city and cost of sale, shall be paid by the city to the owner.

Sec. 38. To determine the mode of inspection of meat, fish, vegetables, fruit, and every article and thing offered for sale in the market places, and to require the hides and skins of animals slaughtered for sale thereat to be brought to said market or markets, or such other place as to be directed by the mayor or city council, that the marks and brands thereof may be examined by the city marshal or other officer appointed for that purpose, in order that a record be kept of the same for public inspection.

Sec. 39. To prevent any person from bringing, depositing, or having within the limits of said city any

dead carcass, or other offensive or unwholesome substance or matter, and to require the removal or destruction by any person who shall have placed, or caused to be placed, upon or near his premises, or elsewhere, any such substance or matter, filth, or any putrid or unsound beef, pork, fish, hides or skins of any kind, fruits or vegetables; and in default, to authorize the removal or destruction thereof by some officers of the city; and to require the owner of any dead animal to remove the same to such place as may be designated.

Sec. 40. To make such rules and regulations in relation to butchers as they may deem necessary and proper.

Sec. 41. To provide for the enclosing, regulating and improving of all public grounds and cemeteries belonging to the city, and to direct and regulate the planting and preserving of ornamental and shade trees in the streets, sidewalks and public grounds.

Sec. 42. To erect, establish and regulate one or more work houses, house of correction, and poor houses, and provide for the government and support of the same, and to regulate or prohibit the establishment of private hospitals.

Sec. 43. To prevent, regulate and control the driving of cattle, horses, and all other animals into or through the city.

Sec. 44. To prevent the carrying of deadly weapons within the city limits.

Sec. 45. To prevent the encumbering of the streets, alleys, sidewalks and public grounds with carriages, wagons, carts, hacks, buggies, or any vehicle whatever, boxes, lumber, timber, fire-wood posts, awnings, signs or any other substance or material whatever. To compel all persons to keep all weeds, filth, or any kind of rubbish from the sidewalks and streets, gutters, in front of the premises occupied by them; to require and compel the owners to fill up, grade and otherwise improve the sidewalks in front of and adjoining their property. Also to compel owners of property through which any water, ditch or drain runs, to wall up the same.

Sec. 46. To inspect the construction of buildings, and to cause unsafe buildings to be made safe or be removed, and to prohibit the use of certain materials deemed unsafe; and to require every person wishing to erect a building in the city to take out a permit for the same, and to keep a register of all buildings, both private and public, erected, of the kind of material used, and of the intention of such buildings.

Sec. 47. To restrain, regulate and prohibit the selling or giving away of any intoxicating or malt liquors, by any person within the city, except by persons duly licensed. To forbid and punish the selling of liquors to any minor or habitual drunkard.

Sec. 48. To provide for and cause to be taken a census of the inhabitants of the city.

Sec. 49. To license, tax, and regulate billiard tables, pin alleys, ball alleys; to suppress and restrain disorderly houses, tippling shops and groceries, bawdy

houses, houses of prostitution or assignation, gambling houses, lotteries, and all fraudulent devices and practices, and all kinds of indecencies.

Sec. 50. To license, tax, and regulate hackmen, draymen, omnibus drivers, and drivers of baggage wagons, porters and all others pursuing like occupations, with or without vehicles, and prescribe their compensation, and provide for their protection, and make it a misdemeanor for any person to attempt to defraud them of any legal charge for services rendered; and to regulate licenses, and restrain runners for railroads, stages and public houses.

Sec. 51. To license, tax, and regulate, suppress and prohibit theatres, circuses, the exhibit of common showmen, and shows of every kind, and the exhibition of natural and artificial curiosities, caravans, menageries, and musical exhibitions and performances.

Sec. 52. To license, tax and regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, and keepers of theatrical or other exhibitions, shows and amusements.

Sec. 53. To license, tax and regulate merchants, commission merchants, hotels, and boarding house keepers, restaurants, drinking houses or saloons, bar rooms, beer saloons, and all places or establishments where intoxicating or fermenting liquors are sold; brokers, pawn-brokers, money brokers, real estate agents, insurance brokers, insurance agents and auctioneers, and all other trades, professions, occupations and callings which are taxed by the general laws of the State.

Sec. 54. To license, tax, regulate and suppress public balls, dances, and all other places of resort and public amusement.

Sec. 55. To suppress, by ordinance, gaming and gambling of all kinds and descriptions, and to prevent the same by forcibly entering all houses used for gaming, and arrest such parties, and punishing all persons engaged in gaming, or any person renting a house for the same, by fine or imprisonment, and to place a police force at the entrance of such houses and arresting all persons attempting to enter there, until the police have had full admittance to the premises.

Sec. 56. To establish standard weights and measures, to be used within the city in all cases not otherwise provided by law. To require all traders and dealers in merchandise, or property of any kind which is sold by weight or measures, to cause their weights and measures to be tested and sealed by the city seal, and be subject to his inspection. The standard of such weights and measures shall be conformable to those established by law.

Sec. 57. To regulate and provide for the inspection and measuring of lumber, shingles, timber, posts, and all kinds of building materials, and for measuring all kinds of mechanical work, and to appoint one or more inspectors and measurers thereof; exclusively to provide for the measuring of wood and weighing of hay and the manner and place of selling the same.

Sec. 58. To prevent and suppress any riot, affray, noise, disturbance, or disorderly assembly in any public or private place in the city.

Sec. 59. To prevent any immoderate driving or running of horses or other animals in the streets; to punish the driver of such animals; to compel persons to fasten their horses or other animals, attached to vehicles or otherwise, while standing or remaining in the streets.

Sec. 60. To restrain and punish vagrants, mendicants, street beggars, and prostitutes; such punishment to be by fine, imprisonment, or hard labor.

Sec. 61. To prevent the erection of all factories or establishments on the banks of streams or ditches which will befoul or make impure their waters.

Sec. 62. To regulate the weight and quality of bread to be sold and used in the city, and generally, everything relating to bakers, butchers, tavern keepers, restaurants, fruit vendors, eating houses and bar rooms, except the price of the articles vended.

Sec. 63. To establish and regulate public grounds, and to regulate the running at large of horses, mules, cattle and sheep; to regulate, restrain and prohibit the running at large of swine or other animals, and to authorize the distraining, impounding and sale of the same, for the costs of the proceeding and penalty incurred, and to impose penalties on the owners thereof for a violation of any ordinance in relation thereto.

Sec. 64. To tax regulate, restrain and prohibit the running at large of dogs, and to authorize the distraining, impounding and destruction of the same, and to impose penalties on the owners and keepers thereof.

Sec. 65. To abate all nuisances which may impair or affect the public health or comfort in any manner they may deem expedient; to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.

Sec. 66. To compel the owner or occupant of any grocery, soap, tallow or chandler establishment, a blacksmith shop, tannery, stable, slaughter house, distillery, brewery, sewer, privy, or other unwholesome or nauseous house or place, to cleanse, remove or abate the same, as may be necessary to the health, comfort and convenience of the inhabitants.

Sec. 67. To direct the location and regulate the management and construction of breweries, tanneries, blacksmith shops, founderies, livery stables and manufacturing establishments; to direct the location and regulate the management and construction of, and restrain, abate and prohibit within the city, slaughtering establishments and hide houses; or establishments for keeping or curing hides, tallow, offal, and such other substances as may be rendered; and all other establishments or places where nauseous, offensive or unwholesome business may be carried on.

Sec. 68. To regulate the burial of the dead; to purchase, establish and regulate one or more cemeteries; to regulate the registration of deaths; to direct the returning and keeping of bills of mortality, and impose penalties on physicians, sextons and others, for any default in the premises.

Sec. 69. To regulate and determine the times and places of bathing and swimming in the waters within said city, and to prevent any obscene or indecent exhibition, exposure, or conduct.

Sec. 70. To abate and remove nuisances, and punish the authors thereof by penalties, fines and imprisonment; and to define and declare what shall be nuisances, and authorize and direct summary abatement thereof.

Sec. 71. To prevent all boxing matches, sparring exhibitions, cock and dog fighting, bull fighting, and all brutal exhibitions, and punish all persons thus offending.

Sec. 72. To prevent all trespasses, breaches of the peace and good order, assaults and batteries, fighting, quarreling, using abusive and insulting language, misdemeanors, and all disorderly conduct, and punish all persons thus offending.

Sec. 73. To prevent and punish the keeping of houses of prostitution within the city, or within such limits as may be defined by ordinance, and to adopt summary measures for the removal or suppression, or regulation and inspection of all such establishments.

Sec. 74. To direct and control the laying and construction of railroad tracks, turnouts and switches, or prohibit the same in the streets, avenues and alleys, and location of depot grounds within the city; to require that railroad tracks, turnouts and switches, shall be so constructed as to interfere as little as possible with the ordinary travel and use of streets

avenues and alleys, and that sufficient space shall be left on either side of said tracks for the safe and convenient passage of teams, carriages, and other vehicles and persons; to require railroad companies to keep in repair the streets, avenues or alleys through which their track may run, and if ordered by the city council, to light the same, and to construct and keep in repair suitable crossings at the intersections of streets, avenues and alleys, ditches, sewers and culverts, when the city council shall deem necessary; to direct the use and regulate the speed of locomotive engines within said city, or prevent and prohibit the use of or running of the same within the city.

Sec. 75. Exclusively to prevent, control and regulate everything connected with city railroads, and to make such rules and regulations for the same as the city council may deem necessary.

Sec. 76. To require the owner, agent or occupant of any ground, lots, yards, private drain, sinks and privies to fill up, cleanse, alter, repair, fix and improve the same as may be ordered by the mayor, or any resolution or ordinance of said city; and in the event of any failure, neglect or refusal to comply with such order, the party so failing shall be liable to fine and imprisonment. In the event of there being no person in the city on whom such order can be served, the city may have such work done and such improvement made on account of the owner thereof, and all costs, charges and expenses shall be a lien on the property, on the filing of a memorandum thereof by the mayor, under the seal of the corporation, and recording the same with the district

clerk; and the city may enforce said lien and institute suit in the corporate name, and obtain judgment against party for the amount so due as aforesaid, in any Court having jurisdiction.

Sec. 77. To inspect all buildings and establishments, and for educational or asylum purposes, to see that the inmates thereof, are properly treated, and to require all institutions, of whatever nature, used as asylums, colleges or boarding schools, to make a report of the number of inmates, and sanitary condition of same, every month.

Sec. 78. The city council shall have power to pass, publish, amend and repeal all ordinances, rules and police regulations not contrary to the Constitution and laws of this State, for the good government, peace and order of the city and the commerce thereof, that may be necessary or proper to carry into effect the powers vested by this act in the corporation the city government or any department thereof; to enforce the observance of all such rules, ordinances and police regulations, and to punish violations thereof by fines, penalties, and imprisonment in the prison work house, or house of correction, or both, in the discretion of the Court before whom conviction may be had, but no fine or penalty shall exceed one hundred dollars, nor the imprisonment more than one month, for any offense; and for any fine, penalty and costs imposed by the mayor in the trial of any cause or complaint before him, execution may issue to collect such fine and costs, to be levied and executed in the same manner that executions are from a justice's Court; the same shall be issued by the city clerk, under the corporate seal, to the city mar-

shal, who, in levying on property and selling, shall have like power and authority as the sheriff of the county in executions issued from a justice's Court; and the laws of the State, so far as applicable, shall apply to and be in full force and effect as to executions issued from the mayor's Court and the city marshal executing the same. Any person upon whom any fine or penalty is imposed may be committed until the payment of the same with costs, and in default thereof may be imprisoned in the city prison or work house or house of correction, or be required to labor on the streets or other public works of the city, for such time and in such manner as may be provided by ordinance; provided, such imprisonment shall not exceed one month, unless a larger period is herein allowed, and no suit shall be against the city for damages for imprisonment under its ordinance.

Sec. 79. And no police officer shall be liable for damages for any act committed in the proper discharge of his duties.

Powers of the Mayor.

Sec. 80. The mayor shall have power to sign or veto any ordinance passed by the city council. Any ordinance vetoed by the mayor may be passed over the veto by a vote of two-thirds of the whole number of councilmen elected, notwithstanding the veto; and should the mayor neglect or refuse to sign any ordinance, or return the same, with his objections in writing, at the next meeting of the council, the same shall take effect without his signature. All orders and drafts upon the treasurer for money shall be signed by the mayor, and shall be tested by the city clerk.

Sec. 81. The mayor shall preside at all the meetings of the city council, except as herein otherwise provided, and shall have a casting vote when the council is equally divided, and not otherwise, and shall have the superintending control of all the officers and affairs of the city, and shall take care that the ordinances of the city and this act are complied with.

Sec. 82. He shall sign the commissions or appointments of all officers elected and appointed in the city government.

Sec. 83. He shall be a conservator of the peace throughout the city, and shall, at all times, have power, by and with the consent of the city council, to appoint any number of special policemen, which he may deem necessary to preserve the peace of the city, and dismiss the same at pleasure.

Sec. 84. He shall, from time to time, communicate to the city council such information and recommend such measures as in his opinion may tend to the improvement of the finances of the city, the police, health, security, ornament, comfort and general prosperity of the city.

Sec. 85. The mayor or any two councilmen shall have power to call special meetings of the city council, the object of which shall be submitted to the council in writing, and the call and object thereof shall be entered upon the journal by the clerk.

Sec. 86. The mayor shall have power, when he deems it necessary, to require any officer of the city

to exhibit his accounts or other papers, and to make report to the council in writing touching any subject or matter he may require pertaining to his office.

Sec. 87. The mayor shall be active and vigilant in enforcing all laws and ordinances for the government of the city, and he shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty; he shall have jurisdiction, as may be vested in him by ordinance, over all places within five miles of the corporate limits of the city for the enforcement of any health or quarantine ordinance or regulation thereof

Sec. 88. The mayor is hereby authorized to call on every male inhabitant of the city over eighteen years of age, and under the age of fifty years, to aid in enforcing the laws and ordinances of the city, and, in case of necessity, to call out the militia within the city to aid in the suppression of any riot, or in the enforcement of any ordinance; and any person who shall not obey such call shall forfeit to the city a fine not exceeding one hundred dollars.

Sec. 89. The mayor shall have power to remit fines and forfeitures, to grant reprieves and pardons for all offenses arising under the ordinances of the city, by and with the consent of the council.

Sec. 90. The mayor shall have power, by and with the consent of the council, to appoint all officers, other than those provided for in this act, that may be deemed by the council necessary for the good government and efficient police of the city, and to remove from office, by and with the consent of the

council, any person holding an office created by ordinance.

Sec. 91. In case of the temporary absence or illness of the mayor, or in case of vacancy in the office of mayor, the councilmen chosen to act as mayor shall have like power with the mayor to try all cases of the violation of the city ordinances, and it shall be his duty to do so.

Sec. 92. The mayor shall have power to administer oaths of office, and also all other oaths and affirmations, and to give certificates thereof. He shall also have power to solemnize marriages.

Sec. 93. The mayor shall be the chief judicial magistrate of the city; and as such he shall hold a Court within said city, by the name of the mayor's Court of the city of El Paso, which said Court shall have jurisdiction of all infractions of the ordinances of said city, and shall be deemed always open for the trial of said cases. The said Court shall have full power, authority and jurisdiction in all cases arising under the ordinances of said corporation, and for any breaches and violations thereof, and of any and all persons thus offending, and to try and determine all suits, actions and complaints charging a violation of any ordinance of said city, and may grant new trials, on motion in writing, showing sufficient cause, and duly sworn to. The mayor may require of any person arrested under the provisions of this act, a bond for his or her good behavior, and to keep the peace with two good and sufficient sureties, which bond shall be payable to the city of El Paso. He shall have full power and authority to issue subpoenas for witnesses

and to compel their attendance; he may punish all contempts by fine and imprisonment, or either; may issue writs of capias, warrants of arrest, search warrants, executions, and all process known to the law which a justice of the peace of this State may lawfully issue; and all of said writs and process shall be issued, served and executed under the same form, and in the same manner as the like process would be when issued by a justice of the peace, unless herein otherwise provided; but in no case shall any such process be issued by the mayor, or executed, unless it be for a violation or infraction of some ordinance of the city of El Paso; and further provided, that in no case shall he entertain jurisdiction in civil suits. The city council shall determine what costs shall be charged in proceedings in and for all process issued in said Courts; provided, that said costs shall in no case exceed those allowed by law to justices of the peace in similar cases.

Sec. 94. Persons arraigned for violations of city ordinances demanding a trial by jury, shall deposit with the city clerk the sum of six dollars as security for the payment of the cost of such jury: provided, that when any person so arraigned shall make oath that he or she is unable, from poverty, to make such deposit, then such deposit shall not be required.

Sec. 95. In all cases before the mayor arising under the ordinances of the city, wherein the fine exceeds twenty dollars, or the imprisonment five days, an appeal may be taken by the defendant to the Court having criminal jurisdiction in and for the county in which said city is situated; but no such appeal shall be allowed unless such defendant shall, within ten

days after conviction, enter into recognizance, and deposit with the district clerk a sum sufficient for the payment of the costs of appeal, should it be determined against appellant. Any person convicted before the mayor of an offense under the ordinances of the city, shall be punished by fine, or imprisonment to hard labor, as may be regulated by ordinance. The city attorney shall, by himself or deputy, appear and prosecute all cases in the mayor's Court arising under the ordinances of the city

Sec. 96. At the first meeting of the city council after the promulgation of the result of the election for mayor and city councilmen, they shall proceed to elect one city marshal, and assistant marshal, or assistant marshals, one city clerk, a city assessor and collector, a city treasurer, a city surveyor and engineers, a city attorney, one or more market masters, a street commissioner, water commissioner, and such police officers and other officers as they may deem necessary for the proper administration of the city government, and for the interests of the city; and shall provide for the dismissal of officers so appointed, for malfeasance, or incompetency, or other cause, and shall fill vacancies as they may occur in the above named offices.

Sec. 97. That the assessor and collector of the city shall make up all the assessments of all property taxed by the city in accordance with this act, and the directions of the city council; he shall collect all taxes due the city, and in the event of the nonpayment of any taxes, proceed to sell property to raise the amount of taxes due thereon; and shall, in the performance of his duties, observe the provisions

of this act and the ordinances of the city relating thereto. He shall give bond in such amount as the city council may provide, with good and sufficient sureties; and the city council may require a new bond whenever, in their opinion, the existing bond is insufficient; and whenever such new bond is required, he shall perform no official act until said bond shall be given and approved. He shall, at the expiration of every week, pay to the treasurer all the money by him collected, in the same funds received by him, taking duplicate receipt therefor, one of which shall be filed with the city secretary on the next Monday thereafter, and shall report to the city council, at the first meeting of that body in each month, all moneys so collected and paid; and he shall perform all such other duties, and in such manner, and according to such rules and regulations, as the city council may prescribe. He shall collect all sums due from license, to give receipt for the same, as well as for all other money paid him for taxes, and for that purpose said collector shall keep a book containing printed blank receipts, as well as corresponding marginal summaries, and before the delivery of any receipt he shall fill up a blank therefor, as well as the corresponding marginal summary, in said book, leaving therein the corresponding marginal summary as a permanent register of his office, subject to public inspection. He shall produce said register at every regular meeting of the board, and at any special meeting when required. He shall require all persons doing business for which a license may be necessary, to take out such a license. He shall report to the mayor all persons engaged in any business illegally, or without license. He shall give notice to all tax payers, within one week receiving the tax list, by

advertising in the official journal of the city, and by posters, that said taxes are due and payable, and when the same may be paid, and generally to comply with such rules and regulations as the city council may prescribe. The collector shall receive such fees and commissions for his services as may be allowed by the city council; provided, such compensation shall not exceed five per cent on all moneys collected by him.

Sec. 98. The treasurer for the city shall give bond in favor of the city of El Paso in such amount as may be required by the city council, and with sufficient sureties, conditioned for the faithful discharge of his duties. He shall receive and securely keep all moneys belonging to the city, and make all payments for the same, upon order of the mayor, attested by the clerk. He shall keep regular and correct accounts of the real, personal and mixed property, and shall render a full and correct monthly statement of his receipts and payments to the city council, and whensoever at other times he may be required by them to do, and shall do and perform such other acts and duties as the city council may require, and for his services shall receive such compensation as shall be fixed by the city council, not to exceed two per cent, on all money that may come into his hands by virtue of his office.

Sec. 99. The powers and duties of the street commissioner, and the salary for his services, shall be prescribed by resolution or ordinance of the city council.

Sec. 100. The powers and duties of the city sexton, market master, water commissioners, policemen, and other officers not herein named, and the salary thereof, shall be defined by the mayor and city council.

Sec. 101. The city marshal, either in person or by deputy, shall attend upon the mayor's Court while said Court is in session, and shall promptly and faithfully execute all writs and process issued from said Court; he shall also attend all general and special meetings of the city council; he shall be the chief police officer of the city under the mayor; he shall have like power with the sheriff of the county to execute the writ of search warrant; he shall be active in quelling riots, disorders and disturbances of the peace within the limits of said city, and shall take in custody all persons so offending against the peace of the community; and shall have authority to take suitable and sufficient bail for the appearance before the mayor's Court of any person charged with an offense against the ordinances or laws of the city. It shall be his duty to arrest all violators of the public peace, and all persons who shall obstruct or interfere with him in the execution of the duties of his office, or who shall be guilty of any disorderly conduct or disturbances whatsoever; to prevent a breach of the peace, or to preserve quiet and good order. He shall have authority to close any theatre, barroom, ball room, drinking house, or other place or building of public resort, in the prevention and suppression of crime and arrest of offenders. He shall have powers, and execute like powers, authority and jurisdiction, as the sheriff of a county under the laws of the State within the city limits. He shall receive the same fees as the sheriff and constables of a county do by law

for like services; and he shall give such bond for the faithful performance of his duties as the city council may require; and he shall perform such other duties, and have such other powers, rights and authority, as the city council may by ordinance require and confer, not inconsistent with the Constitution and laws of the State.

Sec. 102. The assistant marshal, or assistant marshals, shall have the same power and authority as the city marshal, and perform the same duties as the marshal.

Sec. 103. The duties of the engineer and surveyor shall be fixed by the city council, and also his compensation, and the fees he shall be allowed for all work done for the city or private individuals as city engineer and surveyor, as well as the amount of bond he shall give for the faithful performance of his duties.

Sec. 104. The city attorney shall, by himself or deputy, appear and prosecute all cases in the mayor's Court, arising under the ordinances of the city. He shall attend upon the meetings of the city council to give his advice and counsel; he shall give his legal opinion upon all legal questions arising under the city government; he shall aid, when called upon, to revise or draw up any ordinance of the city, and for this service he shall receive no extra compensation other than his salary, and such fees as the city council may see fit to allow for convictions before the mayor's Court.

Sec. 105. That it shall be the duty of the city clerk to attend every meeting of the city council, and keep

accurate minutes of the proceedings thereof, in a book to be provided for that purpose; engross and enroll all laws, resolutions and ordinances of the said city council; to keep the corporate seal; to take charge of, preserve and keep in order all the books, records, papers, documents and files of said city; to countersign all commissions issued to the city officers, and licenses issued by the mayor, and to keep a record or register thereof; and to make out all notices required under any regulation or ordinance of the city. He shall draw all warrants on the treasurer, and countersign the same, and keep an accurate account thereof in a book to be provided for the purpose. He shall also be clerk of the mayor's Court, and shall have cutody of all books and papers belonging to said Court. He shall make out all process and writs, and enter upon a docket all complaints for violation of infraction of city ordinances before the mayor, and his judgment or sentence therein. He shall have power and authority to administer all oaths and affirmations, and as clerk of said Court shall be entitled to such fees as are allowed the clerk of the District Court for like services. The city clerk shall be the general accountant of the corporation, and shall keep in books regular accounts of all receipts and disbursements for the city, and separately, under proper heads, each cause of receipt and disbursement, and also accounts with each person, including officers who have money transactions with the city, crediting amounts allowed by proper authority, and charging each with all warrants drawn in his favor and specifying the particular transaction to which such entries apply. He shall keep a financial record of the city in a proper book-keeping style, and publish a statement thereof at the end of each quar-

ter. He shall also keep a register of bonds and bills issued by the city, and of all evidence of debt due and payable to it, noting the particulars thereof, and of all facts connected therewith as they occur. He shall carefuly keep all contracts made by the city, and he shall do and perform all such other duties as may be required of him by any law, ordinance, resolution or order of the city council. He shall receive for his services such compensation as the city council may prescribe.

Sec. 106. The duties of all officers not herein mentioned shall be regulated and fixed by the city council.

Of Taxation.

Sec. 107. The city council shall have power within the city, by ordinance, to annually levy and collect taxes for general purposes, not exceeding one per cent, on the annexed value of all real and personal estate and property in the city.

Sec. 108. To levy and collect special taxes for special purposes; provided, such special taxes shall not exceed one-half of one per cent, on the property taxed annually.

Sec. 109. That the city council shall have power to levy and collect taxes, commonly known as licenses, upon trades, professions, callings, and other business carried on, and upon carriages, hacks, coaches, buggies, drays, carts, wagons, and other vehicles used in said city and whether the same are for public or private use. That each and every person and firm engaged in the following trades, professions, callings and business, among others, shall be liable to pay

such license tax, but this enumeration shall not be construed to deprive the city council of the right and power to levy and collect other license taxes, and from other persons and firms, under the general authority herein granted: Every member in said city, and every person and firm engaged in selling goods, wares, or merchandise; every person and firm selling liquor in quantities over a quart; every person or firm keeping a grog shop, tippling house; bar room or drinking saloon; every person or firm keeping a place where spirituous liquors, wines or beer is sold in quantities less than one quart; every person or firm keeping a billiard table, ball alley, or nine or ten pin alley, or any similar game; every person or firm keeping a tavern, hotel or boarding house; every person or firm keeping a restaurant, eating house, oyster shop, oyster saloon, or place of any description where eatables or refreshments are furnished; every person or firm keeping a livery stable or stables; every person or firm selling goods, wares, the occupation of real estate broker or agent, merchandise or produce broker, or commission business; any person or firm pursuing the occupation of hawkers, a peddler of goods or any articles whatever; every firm or person keeping a brewery, beer shop or distillery; any person or firm keeping any storage warehouse, or engaged in any manufacturer's business, keeping an intelligence office; each and every insurance company, or agent of insurance company, shall all be liable to pay said city license tax; and every agent of insurance companies shall be held responsible for each association, corporation or company of which he is agent.

Sec. 110. That each and every person or firm selling goods, wares or merchandise, within said city,

by the sample, card or other specimen, or by a written, printed, trade list or catalogue, shall also be subject to and pay said license tax; provided, this last provision shall not apply to merchants doing business within said city, and duly licensed. Any person or firm pursuing occupations, business avocation, or calling subject to a license tax, shall pay on each; and no license shall extend to more than one establishment, or include more than one occupation, business or calling.

Sec. 111. The city council shall have power to provide by ordinance for the assessing and collecting of the taxes aforesaid, and determine when taxes shall be paid by corporations, and when by the individual corporators; provided, no tax shall be levied unless by consent of two-thirds of the aldermen elected under this act.

Sec. 112. The license tax shall be collected by the assessor and collector, and shall be paid to that officer by each and every person or firm or corporation owing such license. Upon the presentation of the receipt of the assessor and collector, the city clerk shall issue the license under the corporate seal of the city, signed by the mayor and the city clerk. That if any person shall engage in any business, calling or avocation or occupation which, by ordinance, is subject to license tax without first having obtained said license, he, she or they shall be liable to imprisonment and a fine of ten dollars for each day said violation of said ordinance may continue; and this section shall apply to all persons owing any license and failing to pay the same. Said taxes, commonly known as licenses, laid as herein provided, shall not

be construed to be a tax on property within the meaning of any other section of this act.

Sec. 113. That the term "real estate" or "property" as used in this act, shall be construed to include lots, lands, and all buildings or machinery and structures of every kind erected upon or affixed to the same.

Sec. 114. That the term "personal estate" or "property" as used in this act, shall be so construed to include all household furniture, moneys, goods, capital, chattel, all public stocks, and stocks in corporations, moneyed or otherwise, and generally all property which is not real.

Sec. 115. That all property exempt from taxation under the laws of the State shall be exempt from taxes imposed or authorized by this act: and the city council may, by ordinance, provide for the exemption from taxation of such other property as they may deem just and proper; provided, nothing contained under this title of taxation shall be construed to prevent the city council from imposing levying and collecting special taxes, for the improvement of avenues, streams, ditches, streets and alleys, as hereinafter provided.

Collection of Taxes.

Sec. 116. That the city council may, and shall have full power to provide, by ordinance, for the prompt collection of all taxes assessed, levied and imposed by this act, hereby authorized and due to the said city, and to that end may and shall have power and

authority to sell real as well as personal property, and may and shall make all such rules and regulations, and ordain and pass all such ordinances, as they may deem necessary to the levying, laying, imposing, assessing and collecting of any of the taxes herein provided.

Sec. 117. The assessor and collector shall, when any property has been sold for the payment of taxes, make, execute, and deliver a deed for said property to the person or persons purchasing the same, and said deed shall be prima facie evidence in all controversies and suits in relation to the right of the purchaser, his, her or their heirs and assigns to the premises hereby conveyed, of the following facts:

Sec. 118. First, that the land or lot, or portion thereof, conveyed was subject to taxation or assessment at the time the same was advertised for sale, and had been listed or assessed in the time and manner prescribed by law. Second, that the taxes or assessments were not paid at any time before the sale. Third, that the land, lot, or portion thereof conveyed had not been redeemed from the sale at the date of the deed, and shall be conclusive evidence of the following facts First, that the land, lot or portion thereof sold was advertised for sale in the manner and for the length of time prescribed by law; second, that the property was sold for taxes or assessments as stated in the deed; third, that the grantee in the deed was the original purchaser; fourth, that the sale was conducted in the manner prescribed by law; and in all controversies and suits involving the title to land claimed and held under and by virtue of such deed, the person or persons claiming title

adverse to the title conveyed by such deed, shall be required to prove, in order to defeat the said title, either that the land was not subject to taxation at the date of the sale, that the taxes or assessments had been paid, that the land had never been listed and assessed for taxation or assessment as required by this act or some ordinance of the city, or that the same had been rendered (redeemed) according to the provisions of this act, and that such redemption was made for the use and benefit of the persons having the right of redemption under the law; but no person shall be permitted to question the title acquired to the said deed without first showing that he, she, or they, or the person under whom he, she or they claim title, had title to the land at the time of the sale, or that the title was obained after the sale, and that all taxes due upon the land have been paid by such person, or the persons under whom he claims title, as aforesaid: provided, however, that the owner of such property shall have the right to redeem the same at any time within two years of the day and date of sale thereof, upon paying to the purchaser double the amount of taxes for which the same was sold, together with the cost of such sale and double the amount of all taxes paid by the purchaser since such sale. The assessor and collector shall be entitled to charge the following fees: For each levy, one dollar; advertising, two dollars on each piece of property; for a deed, two dollars; for certificate of redemption, one dollar. The assessor and collector shall have full power to levy upon any personal property to satisfy any tax imposed by this act. All taxes shall be a lien upon the property upon which they are assessed. And in case any property levied upon is about to be removed out of the city, the assessor and

collector shall proceed to take into his possession so much thereof as will pay the taxes assessed and costs of collection.

Sec. 119. If, from any cause, the sale of property levied upon or seized for taxes shall not take place at the time first appointed, the assessor and collector shall appoint some other time, give like notice, and proceed to sell such property, in the manner prescribed in the first instance, and in case said property levied upon or seized for taxes cannot be sold on the day advertised, such sale may be postponed from day to day, until completed, of which postponment the collector shall give verbal notice at the expiration of sale each day.

Sec. 120. If, at any sale of real or personal property, or estate for taxes, no bid shall be made for any parcel of land or any goods and chattels, the same shall be struck off to the city, and thereupon the city shall receive, in the corporate name, a deed for said property, and shall be vested with the same rights as other purchasers at such sales, and shall have power to sell and convey the same.

Sec. 121. If the real estate of any infant, feme covert, or lunatic, be sold under this act, the same may be redeemed at any time within one year after such disability be removed.

Sec. 122. That if any person shall fail, neglect, or refuse to pay the taxes imposed upon him or her, and his or her property, within the time prescribed by ordinance of said city, the assessor and collector shall, by virtue of his tax lists and assessment rolls,

levy upon so much property liable to taxation, belonging to such persons as may be sufficient to pay his, her or their taxes; and the assessor and collector shall give notice of the time and place of sale by advertisement, in writing, giving the name of the party (if not unknown property), the property, and the amount of taxes, costs, and fees due thereon. Such notice shall be advertised in the official journal of the city, and also posted at the mayor's office, the assessor and collector's office, and two at different public places in the city; and at the expiration of such notice, and on the day therein specified, the assessor and collector shall proceed to sell such property at public auction, in front of the Court house door of the county of El Paso, or such other building as may be used for that purpose; provided, that when real or personal property is offered for sale, the smallest portion of ground shall be sold for which any person will take the same and pay the taxes, costs and fees.

Sec. 123. The assessor and collector, after the completion of the assessment rolls as required by ordinance, shall proceed to collect the taxes therein mentioned, within the time, and give such notice as may be prescribed by the city council; and for that purpose shall call once upon every person taxed, or on the agent or attorney of such person, at the usual place of his or her residence, office, place of business, or elsewhere, and demand the payment of the taxes charged upon his or her personal property, if the person is to be found; if not, then a written demand, specifying the amount of taxes due, left at the residence, with some member of the family over fourteen years of age, shall be a sufficient demand pro-

vided, that if any person thus owing taxes has no residence, office, or place of business, and no agent in the city, or none known to the assessor and collector, then the said demand shall not be necessary, and the ordinary published notice required by ordinance shall be sufficient.

Sec. 124. It shall be the duty of the assessor and collector, at the expiration of the time fixed by ordinance for the rendition of property, to ascertain what property in the city subject to taxation has not been given in, and a list of all such property as is subject to taxation shall be by him presented to the board of appeal, in a supplement to the assessment roll, as unknown, specifying the year for which said tax is due, and the amount thereof; and if said tax is not paid within the time prescribed by law, said property shall be sold at the same time, and with like effect as other property.

Sec. 125. Whenever the assessor and collector shall ascertain that any taxable inhabitants, real or personal property, have not been assessed for any past year, he shall assess the same in his next assessment roll (in a supplement thereto), at the same rate under which such inhabitants and property should have been assessed for such year, stating the years which such inhabitants or property should have been assessed, and the taxes thereon shall be collected in the same manner as other assessments. In all cases where any party has omitted to render property for any former year or years, and such taxes have not been paid, such party shall give such property in for assessment for the years thus omitted, and pay said taxes, and the assessor and collector shall enter such property

in a supplement to his next assessment roll, under the head of payments for former years.

Sec. 126. It shall be the duty of the assessor and collector to assess and return, within the time fixed by the board, all property subject to taxation, and to make out a list of such property, describing as near as possible the quantity, streets and bounds of real estate, and the value of the grounds, and that of the improvements, separately, and to make out a list of all personal property and return the same assessed; and all property not returned to the assessor and collector according to the provisions of this act, he shall proceed to assess the same in the name of the owner, if he be known, and if not, then it shall be assessed by description of the property and last known owner; and the value of all such property shall be determined by the board of revision and appeal, and the same may be sold as in other cases, if the tax be not paid in the time prescribed by law, the assessment be made according to law, and the directions given by the city council.

Sec. 127. The city council, or at least the mayor and three members of said council, shall sit as a board of appeal and revision, to whom shall be submitted by the assessor and collector the tax list, and before whom persons feeling aggrieved may appeal in writing, stating his or her grievances. They shall have (hear) and determine all such appeals in a summary manner, correct errors, appraise all property assessed as unknown, and increase or diminish any assessment as they may see fit. After the board have revised such tax list, the city clerk shall make out a correct list and enter the amendments due from each

person, and it shall be immediately delivered to the assessor and collector, who shall give a receipt for the aggregate amount thereof, which shall be charged to him. If, after or before payment of taxes by any person, any error is discovered in amount, such error shall be corrected by the board on application in writing, and the overcharge, if paid, shall be refunded to the person having paid the same.

Sec. 128. Every person, partnership and corporation owning property within the limits of the corporation shall, within two months after published notice, hand in to the assessor and collector of the city a full and complete inventory of the property possessed or controlled by him, her or them within the said limits, not exempt from taxation, on the first day of March of the current year, verified as required by ordinance; and any person failing or refusing to comply with the provisions of this section shall be liable to fine and imprisonment; and the city council shall, by ordinance, clearly define the duties of tax-payers herein, and make all necessary rules and regulations to secure the rendition of property and the collection of the taxes due thereon.

Sec. 129. The city council shall have power, by ordinance, to regulate the mode and manner of making out tax lists or inventories, and the appraisement of property, and to prescribe the form of oath that shall be administered to each person on such rendition of property, and to prescribe when and how property shall thus be rendered, and to prescribe the number and form of assessment rolls, and fix the duties and define the powers of the assessor and collector, and adopt such measures as they may deem advisable to

secure the assessment of all property within the limits of said city, and collect the tax thereupon; and may, by ordinance, provide that any person, firm or corporation, having property subject to taxation, or being liable for any tax under the provisions of this act, and neglecting to render a list, inventory and appraisement thereof, as required by any ordinance of said city, shall be liable to fine and imprisonment.

Sec. 130. The city council shall be invested with full power and authority to grade and macadamize, pave, repair or otherwise improve any avenue, street or alley, or any portion thereof, within the limits of the city, whenever, by a vote of two-thirds of the aldermen elected or appointed, they may deem such improvement for the public interest; provided, the city council shall pay one-third, and the owners of the property two-thirds thereof, except the intersections of streets, from lot to lot, across the streets either way, which shall be paid for by the city alone.

Sec. 131. Every ordinance imposing any penalty, fine, imprisonment or forfeiture, for violation of its provisions, shall, after the passage thereof, be published by posting printed copies, signed by the mayor and city clerk, and attested by the city seal, in at least three prominent places in each ward in said city; and no such ordinance shall go into effect until it has been so published for five days, and whenever practicable all ordinances requiring publication shall be published in at least one newspaper published in said city. Ordinances passed by the city council, and requiring publication, shall be in force from and after the publication thereof, unless it be therein otherwise expressly provided. Ordinances not requiring publica-

tion shall take effect and be in force from and after their passage, unless it shall be therein otherwise expressly provided. There shall be a digest of the ordinances of the city, which are of a general nature, published as soon as practicable after the passage of this act, and every two years thereafter; provided, it shall be the duty of the city council to cause to be printed in pamphlet form, at the end of each municipal year, all the ordinances passed for the year past and then in force.

Sec. 132. All ordinances of the city, when printed and published by authority of the city council, shall be admitted and received in all Courts and places without further proof.

Sec. 133. The style of all ordinances shall be, "Be it ordained by the city council of the city El Paso," but may be omitted when published in the form of book or pamphlet.

Sec. 134. Whenever any person has been required by the recorder or mayor, acting as recorder, to give bond or bonds for good behavior, or any similar bond, and complied with such order, and been guilty of a violation or infraction of any such bond, and the same is proven or established, to the satisfaction of that officer, in any trial or complaint, such party so offending may be fined in the sum of five hundred dollars, and imprisonment for six months and the city, in its corporate name, may sue in any Court having jurisdiction for the recovery of the penalty of such bond.

Sec. 135. In all cases where any provisions of this act, or by any ordinance passed in pursuance thereof,

a person is required to obtain a license for any calling, occupation, business or vocation, and has, on complaint before the recorder, been adjudged guilty of violating any rule, regulation, or ordinance of the city council, in relation thereto, the recorder, in addition to fine and imprisonment, or either, may suspend or revoke the license so granted.

Sec. 136. Warrants drawn upon the city treasurer for payment of money shall be for immediate payment, and will not be received for taxes or other dues due the city, and not to be considered a circulating medium; and the mayor is forbidden to draw warrants upon the treasurer, only under specific appropriation, and not beyond the amount appropriated by the city council, for all purposes under the city government.

Sec. 137. Two-thirds of the city councilmen shall be a quorum to transact business.

Sec. 138. The mayor shall report to the city council a monthly exhibit of the financial affairs of the city, and shall, at each meeting of the city council, render an account of all fines and penalties assessed by his Court.

Sec. 139. The city marshal shall report each month to the city council, and at any other time when required to do so by the council, a statement of all fines and penalties collected by him, with the treasurer's receipt therefor; and it is hereby made his duty to pay to the treasurer all fines and penalties which he may collect by order of the mayor's Court, within twenty-four hours after he has made such collections.

Sec. 140. The policemen of the city shall have power to arrest all offenders against the ordinances of the city, by day or by night, and keep them in the city prison to prevent their escape until they can be brought before the proper officer. The policemen of the city, and assistant marshal, or marshals, in the discharge of their duties, shall be subject to the orders of the mayor and marshal only. The city marshals and policemen may arrest any person committing any offense against the peace of the city, or a breach of any city ordinance committed in their presence, or on complaint of any person, without a warrant. Policemen serving warrants for the arrest of persons shall be deemed the deputies of the city marshal, and shall have the same powers, and receive the same fees for like services, as constables under the State laws, within the city limits.

Sec. 141. The marshal, in the discharge of his duty, shall be subject to the orders of the mayor only.

Sec. 142. The duties, powers and privileges of all officers of any character, in any way connected with the city government, and not herein defined, shall be defined by ordinance of the mayor and council.

Sec. 143. Lands, houses, moneys, debts due the city, and personal and real property, and assets of every description belonging to the city, shall be exempt from execution and sale but the city shall make provisions, by taxation, or otherwise, for the payment of any and all indebtedness due by the city.

Sec. 144. No person shall be an incompetent judge, justice, councilman, or juror, by reason of his being

an inhabitant or freeholder in the city of El Paso, in any action or proceeding in which said city may be a party in interest.

Sec. 145. When, by the provision of this act, the city council have power to pass ordinances on any subject, they may prescribe any penalty, not exceeding one hundred dollars, for the violation thereof, and imprisonment not to exceed one month, and in case of the imposition of a fine and non-payment, may provide that the party convicted be committed to the jail or house of correction, or be required to work on the alleys, avenues, streets, or any public work of the city, for such time as the city council by ordinance may provide.

Sec. 146. It shall not be necessary, in any action, suit, or proceeding in which the city of El Paso shall be a party, for any bond, undertaking or security to be executed in behalf of the city, but all such actions, suits and proceedings shall be conducted the same as if such bond, undertaking or security had been given: and for all purposes of such actions, suits or proceedings, the city shall be liable in the same manner and to the same extent as if the bond, undertaking or security required in other cases, had been duly given and executed.

Sec. 147. The city council shall have power to prescribe the duties of all the officers and persons appointed by them, or elected to any office or place whatever, subject to the provisions of this act; to revoke any license given under this act; to remit, in whole or in part, and on such conditions as shall be deemed proper, by a vote of two-thirds of all the

members present, any fine or penalty belonging to the city, which may be imposed or incurred under this act, or under any ordinance or regulation in pursuance thereof.

Sec. 148. The members of the city council shall be exempt from jury service during their term of office.

Sec. 149. The office of city councilman shall not be deemed an office of profit; and any person holding office under the State or National government shall be eligible to the office of city councilman of said city.

Sec. 150. The city council shall have power to remove any officer appointed or elected by them, for incompetency, corruption, misconduct or malfeasance in office, after due notice and opportunity to be heard in his defense; and in addition to the foregoing power of removal, the city council shall have power, at any time, to remove any officer of the corporation, elected by them, by resolution declaratory of its want of confidence in said officer; provided, that two-thirds of the council men elected shall vote in favor of said resolution.

Sec. 151. Whenever any person shall be removed from any office, or the term for which he was appointed or elected has expired, or he has resigned or ceased to act in such official capacity, he shall deliver over to his successor all books, papers and effects in any way appertaining to his office. Every person violating this provision shall be guilty of a misdemeanor, and shall be deemed an offender within the meaning of any law of the State punishing

such offense, and in addition thereto shall, on conviction before the mayor, be fined in any sum not exceeding one hundred dollars, and imprisonment for any time not exceeding one month, or either; and any officer who shall have been entrusted with the collection or custody of funds, belonging to said city, who shall be in default to said city, besides being liable to criminal prosecution and a civil action for debt, shall thereafter be incapable of holding any office under said city until the amount of his defalcation shall have been fuly paid to said city, with twelve per cent interest.

Sec. 152. That no member of the city council shall hold any office or employment under the city government while he is a member of said city council, unless herein otherwise provided.

Sec. 153. Resignation by any officer authorized to be elected or appointed by this act shall be made to the city council in writing, subject to their approval and acceptance; provided, that nothing in this act contained shall apply to appointments by the mayor; and any such appointee wishing to resign, shall present his resignation to that officer in writing, for his action.

Sec. 154. All fines, forfeitures and penalties for the breach or violation of any provision of this act, or of any regulation, order or ordinance of the city, shall, when collected, be paid into the city treasury for the use and benefit of said cty

Sec. 155. That Allen Blacker, Joseph Magoffin, Samuel Schultz, B. S. Dowell, and A. H. Franch, be

and they are hereby appointed a board of commissioners for the purpose of holding the first election for mayor and councilmen, as provided for in this act; and said board of commissioners, or a majority of them, shall have all the powers for that purpose that is conferred by this act on the mayor and city council; and said board shall give notice of said election in the manner prescribed in this act. They shall appoint a registrar and judges, and provide for the election; receive and canvass the returns, and publish the result, and do and perform all other acts necessary to be done, which would be lawful if done by the mayor and city council under the provisions of this act; and should any of said board fail or refuse to act, it shall be competent for the others to choose some suitable person to fill said vacancy.

Sec. 156. This act shall be deemed a public act, and may be read in evidence without proof, and judicial notice shall be taken thereof in all Courts and places; and this act shall take effect and be in force from and after its passage.

Approved May 17th, 1873.

Mr. Guinn:

Next, I would like to offer in evidence Defendant's Exhibit No. 52 (Reporter marks same) "An Act to Encourage Irrigation in El Paso County, by Granting Land in aid thereof." (Shows to Mr. Edwards)

Mr. Edwards:

I know what it is. No objection.

The Court:

All right.

Defendant's Exhibit No. 52, which was then read by Mr. Guinn, was admitted in evidence and same reads in words and figures as follows:

Exhibit D-52—Act to Encourage Irrigation, 1874; Omitted from the Printed Record, pursuant to Designations of Counsel as to Printing Record, copied at pages 1, et seq.

* * * * * * * *

The Court:
This was approved on April 25, 1874?

Mr. Guinn:
Yes, sir.

Mr. Edwards:
1874.

The Court:
All right.

(At this point another instrument was marked for identification as Defendant's Exhibit No. 53 and was handed to opposing counsel for examination.)

Mr. Guinn:
I now offer Defendant's Exhibit No. 53, a certified copy of an ordinance dated August 25, 1873, passed by the City of El Paso.

Mr. Edwards:
No objection.

The Court:
That will be your exhibit Number 53?

Mr. Guinn:
Yes, sir.

The Court:
All right.

Defendant's Exhibit No. 53, which was read by Mr. Guinn, was thereupon received in evidence by the Court, and same reads in words and figures as follows:

"D-53".

An Ordinance to Provide for the Temporary Management of the Acequias

Be it Ordained by the City Council of the City of El Paso:

An Ordinance for the protection of the Acequias in the City of El Paso.

Section 1. Be it ordained by the City Council of the City of El Paso, that it is hereby made a misdemeanor for any person to bathe in any acequias in the City, or to cast offal, filth or impurities of any kind therein, or to wilfully or negligently cut or break the borders of any acequias whereby any of the waters of said acequias may flood or overflow any street, road or alley within the City, or while irrigating to wilfully or negligently waste the water of any acequia within the City, or cause the same to be

done, or to drive any herds of sheep, goats, cattle, hogs or other animals into any acequia within the City; or to water the same in any acequia in the City at any other places than those designated as watering places for animals by the Water Commissioners; or who shall take any water from any acequias in the City for irrigating purposes without having first obtained permission of the proper authority. And any person so offending shall upon trial and conviction thereof before the Mayor's Court be punishable by a fine not to exceed one hundred dollars, for each and every such offense, or by confinement in the City for a period not to exceed thirty days, or by both, such fine and imprisonment in the discretion of the Court, and in addition thereto, shall pay the costs of prosecution.

Section 2. That this Ordinance take effect five days from and after its passage.

Approved August 25th, 1873.

(Signed) B. S. DOWELL,
Mayor of the City of El Paso

11/13/54.

A true and correct copy, I do hereby certify.

(S.) J. M. HERRERA,
City Clerk.

(Several instruments were then marked "D-54" thru "D-62".)

Mr. Guinn:

I would like to offer at this time Exhibit No. 54 (Reads same).

Defendant's Exhibit No. 54 was admitted in evidence and reads in words and figures as follows:

"D-54".

An Ordinance to Provide for the Government of Acequias in the City of El Paso.

Section 1st. Be it ordained by the City Council of the City of El Paso, that the Water Commissioners of said city are hereby invested with full authority and control over all the acequias within the City limits and it is hereby made their duty to enforce this Ordinance and all other Ordinances of the City that relate to acequias, and for that purpose they, or either of them, shall have authority, and such authority is confirmed upon them to arrest or cause to be arrested and held for trial any person or persons who may hereafter violate any ordinance in regard to acequias, and said Commissioners shall not be required to make complaint in writing to arrest said person or persons thus offending, but may make or cause to be made summary arrests, provided that before such charge can be tried a written complaint specifying the offense and the ordinance violated shall be filed in the Mayor's Court. And any person who may be tried and convicted before the Mayor's Court for the violation of any provisions of this ordinance, shall be punished by fine in any sum not to exceed One Hundred Dollars or by imprisonment in the City Prison for a term not to exceed thirty days, or by both such fine and imprisonment in the discretion of the Court and shall in addition thereto pay the costs of prosecution.

Section 2d. That all persons who use water from the acequias in this City for domestic purposes or irrigation shall be liable to perform acequia duty as is hereinafter provided; And any person who shall fail or refuse to perform such duty or who shall fail to furnish a substitute to perform the same, whenever called upon by competent authority shall be deemed guilty of a misdemeanor.

Section 3d. That it is hereby made the duty of the Water Commissioners to prepare a list of all persons in the City who are subject to acequia duty under the preceding section, a true copy of which shall always be kept open in the Mayor's office for the inspection of any citizen or person interested, and all persons on said list shall be charged in the rates hereinafter provided, with the labour necessary to be performed by each person to keep the acequia in good repair, and each person performing labour on the acequia shall be credited on said list with each day's labour performed.

Section 4. Every male person residing within the City Limits over the age of eighteen years who is not a householder or planter shall be required to perform in person or by substitute at least one day's labor each year on the public acequia. Each householder who is not a planter shall be required to contribute one or more day's labor on the acequia whenever such work may be necessary. Each planter within the City limits shall be required to contribute labor for keeping the acequias in repair in accordance with the amount of water used by said planter for irrigation purposes to be determined by the amount of land said planter has under irrigation. It is hereby made

the duty of the Water Commissioners to apportion the labour necessary to be done on the Public Acequias pro rata among the three classes mentioned in this section in such manner that each person shall be compelled to furnish labor on the acequias in proportion to the amount of water used by him or her and it is strictly enjoined upon the said Water Commissioners to make such apportionment of labor in a just and equitable manner.

Section 5. Any person who feels aggrieved at the apportionment of labor on the public acequias may remonstrate by petition in writing to the City Council.

Section 6. Whenever in the opinion of the Water Commissioners it shall be necessary to perform labor on the public acequias for the purpose of clearing or repairing the same, the said Commissioners shall proceed to notify all persons who stand charged on their list of labor of the amount of labor they desire such person to perform, stating in said notice the time and place where such labor is necessary and any person so charged with labor, who shall neglect or refuse to appear and perform said labor in person or by suitable substitute when so notified, shall be guilty of a misdemeanor.

Section 7. That any adult person residing in the City of El Paso who shall take or use any water from the public acequias, after having been convicted of a refusal to contribute his or her quota of labor for cleaning or repairing the acequias shall be deemed guilty of a misdemeanor.

Section 8. The Water Commissioners in person, or by deputy, shall have full control over the cleaning

and reopening of all acequias, and shall direct the labour thereon; and any person who shall refuse to obey any lawful order of the Water Commissio. ers shall be deemed guilty of a misdemeanor, and any person who shall upon trial be found guilty of a misdemeanor for violation of any provisions of this ordinance, shall be punished as provided in the first section hereof.

Section 9. That this Ordinance take effect and be in force five days from and after its passage.

Approved August 25th, 1873.
(Signed) B. S. DOWELL.
Mayor of the City of El Paso.

A true and correct copy. I do hereby certify.
City Clerk.

Resolution: Be it resolved by the City Council of the City of El Paso that the Mayor be appointed to superintend and direct the work on the Public Acequias, and any money he may advance for that purpose be refunded to him out of the first money collected, that he keep an account of each day's work and report the same at a regular meeting of the Council.

Approved, October 23d 1873.
(Signed) B S. OWELL.
Mayor of the City of El Paso.

An Ordinance to Levy and Collect a Tax on all Real Estate Within the Limits of the City of El Paso, for Acequias and Other Purposes.

Section 1st. Be it ordained by the Mayor and City Council of the City of El Paso that there be a tax levied and collected for the sum of five hundred and fifty dollars for work and repairs on the Public Acequias, and for other purposes.

Section 2d. That said tax shall be levied and collected pro rata upon the assessed value of all the real estate within the limits of the City of El Paso.

Section 3d. That the City Assessor and Collector shall receive five per cent on the amount of him collected and paid into the City Treasury. in payment for his services as assessor and collector.

Section 4th. That the collection of said Taxes begin in two days after the assessment rolls are made out and returned to the Mayor's Office

Section 5th. That this Ordinance take effect five days after its passage.

Approved. October 23d. 1873
(Signed) B. S. DOWELL.
Mayor.

11 13 54

A true and correct copy. I do hereby certify.
(S.) J. M. HERRERA.
City Clerk.

At this point a recess was had from 12 o'clock Noon until 1:30 o'clock P.M. the same day, at which time proceedings were resumed as follows:

Mr. Grambling:

Your Honor, yesterday counsel for the plaintiff pointed out that there were a few months left off of exhibit 12, which shows the flow of the Rio Grande at El Paso for the year 1913, and through their assistance Mr. Lowry has now got that data and we would like to add it to this exhibit 12, if we may.

Mr. Edwards:

No objection from us at all.

The Court:

All right.

(Defendant's Exhibit 12, referred to above, was previously admitted in evidence and is being forwarded as an original exhibit, among others, to Court of Appeals.)

Mr. Guinn:

Shall I proceed, Your Honor?

The Court:

Yes, Go ahead.

Mr. Guinn:

We would like to offer Defendant's Exhibit No. 55, which consists of several resolutions.

(Shows same to opposing counsel.)

Mr. Edwards:

No objection.

Defendant's Exhibit No. 55, having been received in evidence by the Court, reads in words and figures as follows:

"D-55".

Mayor's Office
November 14th, 1874.

Council met on this date, it being the regular time prescribed by Ordinance for meeting. Present Hon. B. S. Dowell, Mayor.

Alderman Andrew Hornick.
Alderman J. Wilkin Tays.
Alderman A. Blacker.

The credentials of William Treyer, S. C. Slade, and John S. Gillett showing that they were duly elected from the 1st and 3d wards respectively as members of the Council were produced, whereupon they were duly sworn in as Councilmen according to law.

On motion of Alderman Blacker that Council proceed to the election of City Clerk and Attorney, which was carried, whereupon the Council proceeded to vote for City Clerk and Attorney, by ballots, and Edmund Stine received six votes, being a unanimous vote of the Council and was thereupon declared elected.

The following resolution was introduced by Alderman Blacker and passed unanimously:

Resolved that whereas a certain amount is necessary and required to fix the acequia from the river to the Repartidore and to keep the same in order, and whereas it is deniable upon the part of the City Coun-

cil to raise said amount by subscription if possible, and not by taxation. Therefore, be it resolved that all persons who desire to subscribe to said fund be requested to call at the office of the Mayor, where subscriptions will be opened, and subscribe such amounts as they may choose between this date, and the 28th day of November, 1874, and if the citizens should fail to so subscribe a sufficient amount, then that the City Council shall proceed by Ordinance to provide for the collection of a tax for said purpose and that in the meantime there shall be a special committee appointed by the Mayor, whose duty it shall be to draft an Ordinance providing for the levying of a tax for the purpose above mentioned, and that public notice be given of this resolution by poster.

Whereupon the Mayor appointed the committee required by the foregoing resolution, to-wit: Alderman Blacker, Tays and Slade.

On motion Council adjourned. November 14th, 1874.

November 28th 1874.

Council met pursuant to adjournment. Present—Alderman Tays, Treyer, Gillett and Slade and Blacker. Minutes of preceding read and approved.

The following resolution was introduced and passed: Resolved: That the members of the City Council, the Mayor, Capt. A. H. French and Jos. Magoffin be appointed to solicit subscriptions, to raise a fund to keep the acequia in repair and in good order from the river to the Repartidore, such as was contemplated by the resolution passed at a previous meeting, in this city and precinct, and that report be made to an

adjourned meeting of the Council to meet on December 5, 1874.

The following resolution was introduced and passed:

Resolved: That if the citizens of Precinct No. 2 outside of this City will subscribe to said acequia fund that they shall have a voice in the selection of a Water Commissioner in this to wit that for each and every five dollars subscribed either in the City or in said precinct by proprietors or planters, one vote shall be allowed in such election.

On motion claims of T. H. Massey and H. S. Gillett be postponed for consideration until after the acequia business is fully disposed of.

On motion Council adjourned.
11 12 54.

A true and correct copy. I do hereby certify.
J. M. HERRERA,
City Clerk.

Mr. Guinn:
We now offer Defendant's Exhibit No. 56.

Mr. Edwards:
No objection.

Defendant's Exhibit 56, having been received in evidence, reads in words and figures as follows:

"D-56".

Special meeting of the City Council of the City of El Paso, held March 5th 1875.

Present Hon. B. S Dowell, Mayór.
A. Hornick, Alderman.
A. Blácker, Alderman.
J. W. Tays, Alderman.
S. C. Slade, Alderman.
T. S. Gillett, Alderman.
Wm. Treyer, Alderman.
E. Stine, Clerk and City Attorney.

Under a suspension of the rules the following Ordinance was read third time and passed:

Be it ordained by the City Council of the City of El Paso that the Corporation known as the "El Paso Irrigation Company" legally organized under and by authority of laws of the State of Texas, be and the same are hereby given the right of way through the corporate limits of the City of El Paso for the purpose of digging out and enlarging the acequia, known as the Magoffinsville acequia, up to the Repartidore and from that point up to the mouth of the El Paso or Ponce acequia above Harts Mills, so as to conform with the requirements of an act entitled "An Act to encourage Irrigation in El Paso County, by granting land in and thereof", approved April 25th, 1874 Provided however, that should said Corporation not enlarge and secure the acequia from the Repartidor to the mouth of the El Paso or Ponce acequia as aforesaid, then said Corporation shall obligate itself to pay the sum of Two Hundred (200.00) dollars to

the City of El Paso, to be expended in cleaning out and securing that part of the El Paso acequia, from the Repartidor to its mouth, and provided further that the present level of the El Paso acequia will not be interfered with, and that the Magoffinsville Acequia be cleaned out and enlarged at such time as the City Council of the City of El Paso may think proper, so as to interfere in the least possible manner with the use of water running through said acequia.

The following resolution was then introduced and passed:

Resolved, that the new Road made by John S. Gillett leading toward Harts Mill be and the same is hereby received as the main public road, provided the same is made as good as the old road. It is further resolved that John S. Gillett have permission to close up the old road.

On motion Council adjourned until the next regular meeting.

(Signed) B. S. DOWELL.
Mayor.

Approved.

Regular meeting of the City Council held April 19th, 1875.

Present—Hon. B. S. Dowell, Mayor; A. Blacker, Alderman; J. W. Tays, Alderman; A. Hornick, Alderman; Wm. Treyer, Alderman; J. S. Gillett, Alderman; E. Stine, Clerk.

Council proceeded to elect a Water Commissioner for the ensuing year, the ballot being counted and Wm. Treyer receiving a majority of the votes, he was declared duly elected.

It was then moved and seconded that the El Paso Irrigation Company be and the same are hereby authorized, to widen the El Paso or Ponce acequia to an uniform width of 6 feet from the Repartidor to the Hall house and from thence East to make it 7 feet wide, giving the whole acequia such a depth as may be necessary and practicable, provided however, that City Council or other City authorities shall have complete control over said acequia after the same is finished.

It was further moved and seconded that the said El Paso Irrigation Company be and the same is hereby authorized to dig out, widen and enlarge the lower of Playa acequia to a uniform width of 6 feet and a depth of 3 feet.

The following accounts were then presented and allowed and warrants ordered to be drawn for the same.

B. S. Dowell		$18.00		$18.00
E. Stine,	$5.00,	Jos. Magoffin	$3.00	$8.00

The account of B. S. Dowell to have priority.

The Council then adjourned to meet the next regular meeting.

11. 13. 54.

A true and correct copy. I do hereby certify
(S.) J. M. HERRERA,
City Clerk.

Mr. Guinn:
I now offer Defendant's Exhibit No 57.

Mr Edwards:
No objection.

Defendant's Exhibit No 57, having been received in evidence by the Court, reads in words and figures as follows:

"D-57"

Council Chamber,
August 28th, 1875

Pursuant to law the Council met on this date.

Present- Hon M A Jones, Mayor, Wm Treyer, Leander Ruis, Joseph Magoffin, Phillipe Mendoza, John S Gillett, Vicente Ortega, Councilmen A Blacker, City Attorney, G W Rand, Marshal

A quorum being present the Council proceeded to business Reading of the minutes of previous meeting being dispensed with, the Council proceeded to consider the petition of John S Gillet to build, construct, have and maintain a grist mill on the acequia of said town, near the Repartidor of the Franklin and Magoffinsville acequias, which duly read according to the rules, and the question was put on said petition, whether the prayer thereof to grant said privilege

should be granted, or no, and by request the ayes and noes were called, and Wm. Treyer, Leander Ruis, Phillipe Mendosa, John S. Gillett and Vicente Ortega voted aye, and Joseph Magoffin was excused from voting.

And thereupon the following ordinance was introduced and read, and was under suspension of the rules, put upon its final passage, but before the vote was finally taken Joseph Magoffin was excused and left the Council Chamber. The Following is the Ordinance:

An Ordinance granting to John S. Gillett the privilege of building and maintaining a grist mill on the acequia of El Paso and the free use of the water, so far as it does not interfere with irrigation and other uses of the water, or with any vested right, or any right heretofore granted.

Be it ordained by the City Council of El Paso City that John S. Gillett be granted the privilege of building, having and maintaining a grist mill, on the land claimed by him in his petition filed on the 28th day of August, 1875, about 150 yards more or less, below the Repartidor of the acequia known as the El Paso acequia, and the Magoffinsville acequia, on said El Paso acequia, with two run of stones, one to grind wheat and one to grind corn, and the free use of said water to run said mill, to be taken from said El Paso acequia, and used in said mill and passed by means of a toil race to the said Magoffinsville acequia, about 200 yards below said Repartidor, providing that said John S. Gillett construct and build said toil race, and outlet and inlet, from and to said El Paso and Magoffinsville acequia, and keep the same in good order, and not to permit any loss, wastage or overflow of said water whatever, and provided

further that the City Council shall have full power over said toil race and other works connected with said mill, so far as they are connected in any way with the water of said acequia, and to fix the rate of tolls.

II. That said John S. Gillett, his agent, assigns, or successor shall be responsible for any damage caused by negligence, by the overflow of water from said mill, in any of said acequias or toil race.

III. That the City Council herein reserve all its rights at present exercised to regulate said acequias and control the same, as well as the toil race and its mouths to be constructed by said John S. Gillett.

IV. This grant is made with the understanding and agreement of said John S. Gillett that said mill shall be commenced within two months and completed within 12 months from the date of this Ordinance said grant shall be void.

This ordinance to take effect from and after its passage.

And thereupon being put upon its final passage, and the vote being called by ayes and noes, Leander Ruis, Phillipe Mendosa, Vicente Ortega and John S Gillett voting aye, and Wm. Treyer not voting, where upon said ordinance was declared to be passed and ordered to be entered as one of the Ordinances of said City.

11 13 54.

A true and correct copy, I do hereby certify.
(S.) J. M. HERRERA.
City Clerk.

Mr. Guinn:
We now wish to read and offer Exhibit No 58.

Mr. Edwards:
No objection.

Defendant's Exhibit No. 58, which was ready by Mr. Guinn, was thereupon received in evidence by the Court, and same reads in words and figures as follows:

"D-58".

Council Chamber
City of El Paso, Aug. 10, 1875

Meeting of the City Council of the City of El Paso held August 10th 1875.

Present—M. A. Jones, Mayor Elect who having taken the Oath of Office.

Also Present—William Treyer, Alderman Elect Ward No. 1

Also Present—Leander Ruis, Alderman Elect Ward No. 1.

Also Present—Joseph Magoffin, Alderman, Elect Ward No. 2

Also Present—Philippe Mendoza. Alderman Elect Ward No. 2.

Also Present—Vicente Ortega. Alderman Elect Ward No. 3, who were duly sworn in.

Absent—John S. Gillett.

A quorum being present the Council proceeded to business.

On motion it was unanimously resolved that there should be no alteration in the present regulations in regard to the distributions of water or labour to be done until after the present corn crop should be laid by.

On motion it was resolved that the Council proceed to elect a Water Commissioner. When William Treyer was unanimously elected. on motion was resolved that the Council proceed to elect a City Marshal. when Goerge W. Rand was unanimously elected.

On motion it was resolved the Council proceed to elect a City Attorney and Secretary. When Allen Blacker, Esq., was unanimously elected.

There being no further business presented the Council adjourned to the 28th day of August 1875. date of the next regular meeting.

Approved. August 10th. 1875.

(Signed) M A JONES

Mayor

11/13/54

A true and correct copy, I do hereby certify.
(S.) J. M. HERRERA,
City Clerk.

Mr. Guinn:
I next offer Exhibit 59.

Defendant's Exhibit No. 59, having been received in evidence and read by Mr. Guinn, reads in words and figures as follows:

"D-59".

El Paso, Texas
Council Chamber,
Sept. 11th, 1875.

The Council met pursuant to law.

Present—Hon. M. A. Jones, Mayor
Wm. Treyer, 1st Ward
Leander Ruis, 1st Ward
John S. Gillett, 3d Ward
Vicente Ortega, 3d Ward
Absent—Joseph Magoffin, 2d Ward
Phillipe Mendosa, 2d Ward
Present also, A. Blacker, attorney and clerk.

There being a quorum present the Council proceeded to business. Upon motion it was resolved that the Water Commissioner be and he is hereby instructed to construct an aqueduct over the toil race leaving from Harts Mill near the place where it was constructed before, and the exact place to be selected by the Water Commissioner, to be nine feet in the clear.

at least, to be constructed of stone and mortar and such material as the Water Commissioner may select, as cheap as possible, and to be commenced and finished as soon as the money is placed in the hands of said Commissioner.

2d. That in order to raise funds to commence and prosecute said work, the City Attorney is hereby instructed to collect by suit if necessary any moneys that may be due said city, and particularly a claim of $200 owing and due the City of El Paso from the El Paso Irrigation Company.

3d. That the sum of seventy five dollars be and is hereby appropriated to construct said aqueduct.

Council Chamber,
Sept. 25th. 1875.

Council met pursuant to law.
Present—Hon. M. A Jones, Mayor.
Wm. Treyer
Leander Ruis
Jos. Magoffin
John S. Gillett
Vicente Ortega
A. Blacker, Clerk.

On motion the Water Commissioner was instructed to see I. C. Campbell lessee of Harts Mills, and report what arrangement he can make with him in regard to constructing an aqueduct over the toll race at Harts Mills, to an adjourned meeting of this Council, but this is not intended to be in conflict with the

power of the Water Commissioner as heretofore given in regard to constructing said aqueduct.

11/13/54.

A true and correct copy. I do hereby certify.
(S.) J. M. HERRERA.
City Clerk.

Mr. Sims:
We next offer Exhibit 60, which is an Ordinance for the protection of the acequias in the City of El Paso (Shows to opposing counsel.)

Mr. Edwards:
No objection.

Defendant's Exhibit No. 60, which was read by Mr. Sims, was received in evidence by the Court, and same reads in words and figures as follows:

"D-60"

An Ordinance for the Protection of the Acequias in the City of El Paso

Section 1. Be it ordained by the City Council of the City of El Paso that it is hereby made a misdemeanor for any person to bathe in any acequia in this City, or to cast off all filth or impurities of any kind therein, or to willfully or negligently cut or break the borders of any acequia, whereby any of the water of said acequia may flood or overflow any street, road or alley within the City or cause the

same to be done, or to drive any herds of sheep, goats, cattle, dogs, or other animals into any acequia within the City; or to water the same in any acequia in the City at any other places than those designated as watering places for animals by the Water Commissioner; or who shall take any water from any acequia in the City for irrigating purposes without having first obtained permission of the proper authority, and any person so offending, shall upon trial and conviction thereof before the Mayor's Court be punished by a fine not to exceed one hundred dollars for each and every such offence, or by confinement in the City prison for a period not to exceed thirty days, or by both such fine and imprisonment in the discretion of the Court, and in addition thereto, shall pay the costs of prosecution.

Section 2. That this Ordinance take effect five days from and after its passage.

Approved, August 3, 1880.

(S.) S. SCHUTZ.
Mayor.

Book "B" Page 13-14.
11 13 54

A true and correct copy, I do hereby certify.

(S.) J. M. HERRERA.
(Seal) City Clerk.

Mr Sims:

Next we offer Defendant's Exhibit No. 61, which is an Ordinance to provide for the government of acequias in the City of El Paso.

Mr Edwards:

No objection.

Defendant's Exhibit No. 61, which was read by Mr. Sims, was thereupon received in evidence by the Court, and same reads in words and figures as follows:

"D-61".

An Ordinance to Provide for the Government of Acequias in the City of El Paso.

Section 1. Be it ordained by the City Council of the City of El Paso that the Water Commissioner of said City is hereby invested with full authority and control over all the acequias within the City limits, and it is hereby made his duty to enforce this ordinance and all other ordinances of the City that relate to acequias, and for that purpose he shall have authority, and such authority is hereby conferred upon him, to arrest or cause to be arrested and held for trial any person or persons who may hereafter violate any ordinance in regard to acequias, and said Commissioner shall not be required to make complaint in writing to arrest said person or persons thus offending, but may take or cause to be made summary arrests: provided that before any such charge can be tried, a written complaint specifying the offence and the ordinance violated shall be filed in the Mayor's Court, and any person who may be tried and convicted before the Mayor's Court for violation of any provisions of this ordinance shall be punished by fine in any sum not to exceed Twenty-five dollars, or by imprisonment in the City prison for a time not to exceed Thirty days, or by both such fine and imprisonment in the discretion of the Court, and in addition thereto shall pay the costs of prosecution.

Section 2. That all persons who use water from the lower and contra acequias in this City for purposes of irrigation shall be liable to perform acequia duty as is herein after provided; and any person who shall fail or refuse to perform such duty, or who shall fail to furnish a substitute to perform the same whenever called upon by competent authority shall be declared guilty of a *misdemeanor*.

Section 3. That there shall be elected by the City Council two "Repartidores" whose duty it shall be to proportion the amount of water that each planter shall use and to give notice to each person entitled to water where he can take it; the water to be equitable distributed among those entitled to it according to number of acres of land in cultivation, and any person taking water without permission from the "Repartidor" in charge shall be deemed guilty of a misdemeanor—or

Section 4. That it is hereby made the duty of the Water Commissioner to prepare a list of all persons in the City who are subject to acequia duty under this ordinance. A copy of which shall always be kept open in the Mayor's office for the inspection of any citizen or person interested, and all persons on said list shall be required to perform such labor with reference to the amount of water used by each person; and each person performing labor on the said acequia shall be credited on said list with each day's labor performed.

Section 5. When in the opinion of the Water Commissioner, it shall be necessary to perform labor on the lower and contra acequias for the purpose of

cleaning or repairing the same, the said Commissioner shall proceed to notify all persons who stand charged on their list with labor, of the amount of labor they desire such person to perform, stating in said notice the time and place where said labor is necessary. And any person so notified who shal fail or refuse to perform said labor, shall be deemed guilty of a misdemeanor—or

Section 6. Any person who feels aggrieved on the apportionment of labor may remonstrate by petition in writing.

Section 7. That this ordinance take effect and be in force on and after its passage.

Approved, August 21, 1880.

(S.) S. SCHUTZ,
Mayor.

Attest:
S. C. SLADE,
Clerk.
Book "B" Page 24—27.
11 13 54.

A true and correct copy, I do hereby certify:

(S.) J. M. HERRERA,
(Seal) City Clerk.

Mr. Sims:

At this time we would like to offer Exhibit No. 62 in evidence.

Mr. Edwards:

No objection.

Defendant's Exhibit No. 62, which was ready by Mr. Sims, was thereupon received in evidence by the Court, and same reads in words and figures as follows:

"D-62".

El Paso, Texas
April 14th, 1881

To the Mayor and City Council of the City of El Paso, Texas:

Your petitioners, Charles R. Morehead, James A. Tays, who are residents of the Coutny of El Paso in the State of Texas. Edwin C. Manning who is a resident of said County and a citizen of the State of Kansas, and Benjamin Dyetan and Ynocente Ochoa who are residents of the State of Chihuahua in the Republic of Mexico would respectfully represent that under and by virtue of the several chapters and provisions of Title Twenty of the Revised Statutes of the State of Texas they formed themselves into an association or body corporate on the Seventh day of March A. D. 1881, for the object and purpose set forth in their charter, which is hereto attached as a part of this petition, and filed in the office of the Secretary of said State on the 31st day of March, A. D. 1881.

They, your petitioners, would respectfully represent: That said association or Body Corporate is bonafide and was organized for the purposes set forth in Article Two of their said Charter, and that it is now their intention in good faith, with the right and authority of your Honorable Body granted to them to

manufacture, sell and furnish water to said City and to the inhabitants hereof for public or private buildings, and for other public and private purposes, and for irrigation within the limits hereof, and to lay pipes, mains and conductors for conducting water through the streets, alleys, lanes and squares thereof for such uses. Your petitioners do now here promise and agree to (illegible word) with your Honorable Body and your successors in office, that at the earliest practicable time they will manufacture, sell and furnish good and pure water in sufficient quantitites to said City and to the inhabitants thereof, for public and private buildings, and for other public and private purposes, and for irrigation within the limits thereof, and will lay pipes, mains, and conductors for conducting such water through the streets, alleys, lanes and squares thereof for said uses and purposes. Your petitioners do now here further promise and agree to and with your Honorable Body and your successors in office that they will at the earliest practicable time (and at the same time that they shall manufacture and supply water to the inhabitants of said City, for the purposes aforesaid), manufacture and furnish at cost only, quantities of good pure water to and for all public buildings of whatever nature, within said City limits whether City or County such as the Mayor's and Recorder's Office, the City Hall and the County Court House: provided always that your Honorable Body shall now here give and grant to them your petitioners, and their successors, the exclusive right warrant and authority to manufacture, sell and furnish for and during the period of time mentioned in Article One of their said Charter the quality and quantities of water aforesaid, within said City Limits to the inhabitants thereof for public and private buildings, and for other public and private

purposes, and for irrigation and the exclusive right, warrant and authority to lay pipes, mains and conductors for conducting such water through the streets, lanes, alleys and squares thereof for the uses aforesaid. Wherefore, your petitioners pray: That the exclusive right, warrant and authority be now given and granted them in their said corporate capacity, and their successors to manufacture, sell and furnish for and during the period of time mentioned in Article One of said Charter, the water aforesaid, within said City Limits to the inhabitants thereof for public and private buildings, and for other public and private purposes, and for irrigation, and as will the exclusive right, warrant and authority to lay pipes, mains and conductors for the period of time aforesaid and for the uses aforesaid, for conducting such water through the streets, alleys, lanes, and squares of said City; and that a resolution giving and granting such exclusive right, warrant and authority be passed by your Honorable Body with the condition aforesaid.

We have the honor to be very Respectfully

THE EL PASO WATER COMPANY.

By BENJAMIN DYETAN.
YNOCENTE OCHOA.
E. C. MANNING.
C. R. MOREHEAD

(Of record in Minute Book "B" Page 97.)

The State of Texas.
El Paso County.

Be it remembered that Mr Charles R. Morehead, James A. Tays, who are residents of said County and

Citizens of said State. Edwin C. Manning who is resident of said County and Citizen of the State of Kansas, Benjamin Dyetan and Ynocente Ochoa, who are residents of the State of Chihuahua in the Republic of Mexico, do by this instrument of writing form ourselves into an association under and by virtue of the several Chapters and provisions of Title Twenty of the Revised Statutes of said State, and under and with the following articles of incorporation to wit:

Article One.

The name and style of this association shall be the "El Paso Water Company" and shall exist for the period of fifty years and the business thereof shall be transacted at the City of El Paso in said County

Article Two.

This association is formed for the purpose of manufacturing, selling and furnishing water to said City and to the inhabitants thereof, for its public and private buildings, and for other public and private purposes, and for irrigation within the limits thereof and of laying pipes, mains and conductors for conducting water through the streets, alleys, lanes and squares therein for such uses.

Article Three

The incorporators herein named shall constitute the first Board of Directors, and they shall within one hundred and twenty days after the filing hereof in the office of the Secretary of said State elect from their own body a President, Vice President, Secretary and

Treasurer each of whom shall be a member of said Board of Directors and they together with the other members thereof shall have the management of the affairs and business of the company for one year and until their successors shall be duly qualified.

Article Four

The Capital stock of this Company shall be one hundred thousand dollars and be divided into shares of one hundred dollars each, each share entitle the owner thereof to one vote either in person or by proxy at all elections and meetings of the Company. said stock shall be represented by certificates signed by the President and countersigned and sealed by the Secretary, and shall be transferable on the books of the Company and only in person or by attorney

Article Five

Percentum of said Capital Stock shall be subscribed for and paid up within three hundred and sixty five days after the filing hereof in the office of said Secretary of State and an additional percentum shall be subscribed for and paid up. At such time and times as said board of Directors may require

Article Six

Said Board of Directors shall have authority to fill vacancies in their Board occasioned by death resignation or otherwise and shall cause to be kept accurate books of accounts exhibiting the State of the Business, the receipts and expenditures of the Company

Article Seven.

All conveyances and contracts in writing signed by the President and countersigned and sealed by the Secretary of the Company or by any other officer or person therewith constituted and authorized by said Board of Directors and when the same is in execution of an order of such Board, shall be binding and valid.

Given under our hands at the City of El Paso on the Seventh day of March, A. D. 1881

(S.) CHARLES R. MOREHEAD.
(S.) JAMES A. TAYS.
(S.) BENJAMIN DYETAN

Book B Page 100 - 103.
11 13 54.

A true and correct copy. I do hereby certify.
(S.) J. M. HERRERA.
City Clerk.

Mr. Sims:
Next we have Defendant's Exhibit No. 63, which we will offer at this time.

Mr. Edwards:
No objection.

Defendant's Exhibit No. 63, which was read by Mr. Sims, was received in evidence by the Court, and same reads in words and figures as follows:

"D-63"

An Ordinance Granting Certain Privileges to the El Paso Water Company

Be it ordained by the City Council of the City of El Paso

Sec. 1. That "El Paso Water Company" shall have the sole and exclusive right, warrant and authority to manufacture, sell and furnish water, to the inhabitants of the City of El Paso, to both public and private buildings and for irrigation within the corporate limits of the said City of El Paso.

Sec. 2. The said Company shall have the sole and exclusive right, warrant and authority to lay pipes, mains and conductors underneath the streets, alleys, lanes and squares in the City of El Paso for the purpose of conducting water.

Sec. 3. The right, warrant and authority above mentioned and granted shall continue for the period of fifteen years.

Sec. 4. If the said El Paso Water Company shall fail or refuse to furnish as soon as practicable to the inhabitants of the City of El Paso and to the public buildings both State, County and Municipal and private houses therein a sufficient quantity of pure water for all convenient and necessary domestic purposes or shall demand for the water furnished the public building aforesaid more than the cost price thereof then the right, warrant and authority herein granted shall be forfeited.

Sec. 5. Nothing herein contained shall be held to take away limit or impair any public or private right under the acequia system.

Sec. 6. This Ordinance shall take effect from and after its passage.

Sec. 7. The clerk is hereby directed to furnish the said El Paso Water Company with a copy of this Ordinance.

Ordinance number 16 dated May 7 1881

Book B Page 115--116

11 13 54

A true and correct copy. I do hereby certify
S J M HERRERA
(Seal) City Clerk

Mr. Guinn
I offer Exhibit 64, which is Act of March 2, 1889 granting a new charter to the City of El Paso

Mr. Edwards:
No objection.

Defendant's Exhibit No 64 was admitted in evidence, and reads in words and figures as follows

"D-64".

El Paso—Act Incorporating City Of.

Sec

1. Incorporating clause.

2 Defines boundaries thereof.

Officers and Their Election

3 Municipal government.

4 City to be divided into wards.

5 Who are qualified electors.

6 Time of holding general elections.

7 Elective officers.

8 Who eligible to office.

9 Time and notice of election etc.

10 Powers of officers and judges of election.

11 Election returns etc.

12 Time and manner of canvassing vote.

13 City council to elect certain officers.

14 Recorder—qualification and compensation.

Compensation of other officers.

15. Vacancies in office—manner of filling.

Duties and Powers of Officers.

16. Official oath.

17. Mayor—duties of.

18. Further duties and powers of mayor in case of riot, etc.

19. Mayor's duty as to closing places of amusement, etc., in cases of riot, etc.

20. Veto powers of mayor.

21. City recorder—duties of.

22. Secures trial by jury.

23. Right of appeal from judgment of conviction in recorder's Court.

24. Chief of police—duties of, etc.

25. Chief clerk—duties of, etc.

26. Treasurer—bond and duties of.

27. Assessor and collector—duties of.

28. City attorney—duties of.

29. City engineer—duties of—committee on streets.

30. Other duties may be required of officers by council.

31. City council may require bonds.

General Powers and Duties of City Council.

32. City council—how constituted, etc.

33. City Council—stated meetings, petitions to, rules by, etc.

34. City Council—to have control of finances, etc.

35. City Council—power to appropriate money etc.

36. City Council—special funds.

37. City Council—quarantine laws etc.

38. City Council—markets, market houses etc.

39. City Council—hospitals.

40. City Council—rules with regard to butchers.

41. City Council—inspection of beef etc.

42. City Council—abatement of nuisances.

43. City Council—regulations to promote health etc.

44. City council to cooperate with commissioners Courts in making improvements, etc.

45. City Council—may require cleansing of nauseous places.

46. City Council—to direct location of certain industries.

47. Burial of the dead.

48. For abatement of nuisances, etc.

49. May require owners to wall, cover, etc., ditches, drains, sinks, etc.

50. To prevent deposit of dead animals, etc., in city limits.

51. To secure sanitary condition of tenement houses, jails, etc.

52. To prevent befouling water

53. To regulate method, etc., of cleansing cesspools.

54. To inspect educational buildings, etc

55. Sanitation of tenements, etc.

56. To provide water supply etc.

57. Exclusive control over streets, etc

58. Bridges, culverts, etc.

59. To provide for lighting streets, etc.

60. Improving public grounds, etc.

61. To regulate carrying of weapons.

62. To prevent encumbering streets.

63. To license and tax merchants, etc.

64. To license and prohibit peddlers, hawkers, shows, etc.

65. To license, regulate, etc., circuses, etc.

66. To license, etc., hackmen, etc.

67. To license, etc., billiard tables, etc.

68. To authorize issuance of licenses, etc.

69. To prohibit sales or gifts of liquors in evasion of taxes, etc., or to minors etc.

70. To prevent sale and gift of intoxicating liquors at certain places etc.

71. To regulate weight, etc., of bread.

72. To create and regulate police.

73. To suppress, etc., riots, affrays, etc.

74. To prevent horse racing etc.

75. To restrain vagrants, etc.

76. To establish public pounds, etc.

77. To tax dogs, to restrain running at large of, etc.

78. To prevent explosion of firecrackers, firing of guns, etc.

79. To erect work houses etc.

80. To compel city convicts to labor on public works.

81. To prevent breaches of peace, etc.

82. To prevent keeping of disorderly houses, etc.

83. To direct etc., laying of railway tracks, sidings, etc.

84. To assess municipal taxes on city railroads, etc.

85. To prevent driving cattle through city, etc.

86. Passage and publication of ordinances, etc.

87. Ordinances for funding debts, etc.

88. To borrow money to improve streets, etc

89. As to issuing bonds.

90. Bonds to be signed by mayor, countersigned, etc.

91. Bonds to be forwarded to the comptroller for registration.

92. Mayor to furnish comptroller statement of taxable values.

93. To levy taxes on assessed value of real and personal property.

94. Creation of debts provided for.

95. Poll taxes provided for.

96. Occupation tax.

97. Penalty for failing to pay occupation tax, etc.

98. Defines the term "real estate".

99. Defines the term "personal estate".

100. Ordinances for collection of taxes.

Collection of Taxes

101. Manner of making out tax lists, etc.

102. Providing for renditions, etc.

103. City taxes to be assessed and collected in same manner as state, except, etc.

104. Board of equalization.

105. Board of equalization to convene, etc.

106. Board to examine assessment lists, etc., of assessor.

107. Further defining duties of board of equalization.

108. Assessor to furnish lists of persons, etc.

109. Duty of board as to raising valuations, etc.

110. Board to hear persons, the value of whose property has been raised.

111. Board to approve lists, etc.

112. Action of board as provided in section III to be final.

113. Members of said board to be sworn.

Fire Department.

114. Council may establish fire limits, etc.

115. Power to prevent dangerous condition of flues, etc.

116. To prevent deposit of ashes where liable to produce fire, etc.

117. To require inhabitants to keep fire buckets, etc.

118. To regulate, etc., manufactures calculated to cause fires.

119. To regulate, etc., storage of powder in city limits, etc.

120. Parapet walls, etc.

121. To require owners, to provide access, etc., to roofs of houses.

122. To keep away from fires suspicious persons, etc.

123. General regulations, etc., to prevent fires.

124. To maintain fire department.

125. Buildings may be destroyed in case of fire-damages for, etc.

126. Satisfaction of such damages.

127. Board of health.

128. Powers, etc., of board of health.

129. Penalty for persons in charge of cars, etc., to enter city having on board persons afflicted with infectious diseases, etc.

130. Hotel keepers, etc., to report infectious cases.

131. For appointment of health physician.

132. To effect abatement of nuisances, etc.

133. Extraordinary powers of board of health in case of epidemics.

134. Board to keep records, etc.

135. Jurisdiction of the board of health.

Streets and Alleys.

136. City council—power to establish grade of streets, etc.

137. Power to open, widen, etc., streets, etc.

138. Special tax for streets levied on abutting lots, etc.

139. To provide for cleaning streets, etc.

140. Further defining duties of council as to opening and widening streets, etc.

141. Special taxes—due when, etc.

142. As to costs and expenses of grading, etc., streets at points of intersection.

143. City engineer to compute costs to be taxed against abutting lots.

144. Herein as to description of lots.

145. Herein as to sale, etc., of lots for such taxes.

146. Engineer to inspect work, etc.

147. Special tax lien on lots, etc.

148. Herein as exercise of the power of eminent domain.

Miscellaneous.

149. Herein as to removing dilapidated houses, etc.

150. Writs and process—by whom to be executed.

151. Herein as to peace bonds, etc.

152. Herein as to requiring license, etc.

153. Official paper.

154. For publication of receipts, etc.

155. As to publication of ordinances imposing fines, etc.

156. Proof of ordinances.

157. Style of ordinances.

158. As to existing ordinances.

159. Fines, etc., to be paid into city treasury.

160. As to resignations.

161. Herein as to removal of officers.

162. Herein as to malfeasance of officers, etc.

163. Prohibits members of council holding other offices, etc.

164. Herein as to aldermen failing to attend council meetings.

165. City council to prescribe duties of officers.

166. Fixing salary of mayor, etc.

167. City not required to give cost bond.

168. Cemetery lots exempt from forced sale.

169. Herein as to pending suits, etc.

170. Property of El Paso vested in this corporation.

171. Rate of interest on debts.

172. As to free libraries.

173. As to taking city census.

174. Court required to take notice of this act.

175. Emergency clause.

176. Repealing clause.

Chap. 4—(H.B. No. 436) An Act to grant a new charter to the City of El Paso.

Section 1. Be it enacted by the Legislature of the State of Texas: That all the inhabitants of the city of

El Paso shall continue to be a body corporate and politic with perpetual succession by the name and style of the "City of El Paso", and under that name shall be known in law and shall have power to make and use a corporate seal and to alter the same at pleasure; to make such contracts as may be necessary for the more perfect execution or enjoyment of powers, duties, rights, franchises, and immunities hereby granted or imposed; to take, purchase, hold, lease, grant, and convey such property, real, personal, or mixed, as the purposes of said corporation may require, whether the said property be within or without the limits thereof; and to sue and be sued.

Section 2. That all that portion and no more of the county of El Paso embraced within the bounds hereinafter in this section set forth and described shall be within the limits of said city, and subject to its jurisdiction: that is to say, beginning at the southwest corner of the present Fort Bliss military reservation as established by the military survey; thence due north along the west boundary line of said reservation and beyond the same to the intersection of an extension due west of the north boundary line of the "N.W. Burdett Survey No. 1", commonly known as the "Bassett Addition", thence due east to the northwest corner of the said "N.W. Burdett Survey No. 1;" thence due south to the international boundary line between Texas and Mexico; thence along said boundary line to its intersection with a line running due south from the southwest corner of the aforesaid military reservation; thence due north to the place of beginning: Provided, That whenever a majority of

the male freeholders over twenty-one years old, who are citizens of the state of Texas and inhabitants of any territory adjoining said city, shall desire to have such territory annexed to the said city, they may present a written petition to that effect to the city council, and shall atach to said petition the affidavit of one or more of their number to the effect that said petition is signed by a majority of such freeholders; and thereupon the city council, at any regular session held not sooner than twenty days after the presentation of said petition, may by ordinance annex said territory to the city, and thenceforth the said territory shall be a part of the city and the inhabitants thereof shall be entitled to all the rights and privileges of other citizens and shall be bound by the acts, ordinances, resolutions, and regulations of the city: And provided further, That the city council may make, pass, or ordain such rules, regulations, ordinances, or resolutions as may be necessary to secure the more perfect use and enjoyment of and the maintenance of good order on real estate owned or occupied for municipal purposes by the city out of the limits thereof and within the county of El Paso, and all violations of such rules, regulations, or ordinances, shall be punishable in the recorder's Court.

Officers and Their Election.

Sec. 3. The municipal government of the city shall consist of a city council, which shall be composed of a mayor and a board of aldermen. A majority of the board of aldermen shall constitute a quorum for the transaction of business except at called meetings or meetings for the imposition of taxes, when two-thirds

of the full board shall be required unless otherwise herein specified.

Sec. 4. The city council shall divide the city into such wards as it may deem advisable and may increase or diminish the number of wards and change their boundaries at pleasure: Provided, That the number of wards shall never exceed nine and until the population of the city shall be twenty-five thousand or more the number of wards shall not exceed six: And provided further, That no change shall be made in the number or boundaries of the wards within four months preceding any regular municipal election.

Sec. 5. Every person who is entitled to vote, for members of the legislature of this state, and who shall have resided within the corporate limits of the city for six months and in the ward in which he offers to vote for twenty days next preceding any city election held for the purpose of electing officers, shall have the right to vote thereat.

Sec. 6. There shall be an election of city officers in said city held in the manner hereinafter specified on the second Tuesday in April of each and every year: Provided, That if this act shall not go into effect in time to allow of notice being given under its provisions for an election on the second Tuesday in April, 1889, then, and in that event the first general election under this act shall be held on the fifth Tuesday after this act shall take effect and be in force, and all officers elected at said first election or by the city council as provided in section 13 of this act shall hold office until the qualification of their successors in accordance with this act.

Sec. 7. The qualified electors of said city shall elect the following named officers thereof: The mayor, two aldermen from each ward, a recorder, a treasurer, a city attorney, a city assessor and collector, and a city engineer, each of whom shall hold his office for two years and until the election and qualification of his successor: Provided, That of the officers elected at the first election held in accordance with this act, one alderman, to be determined by lot from each ward, the recorder, the treasurer, the city attorney, the city assessor and collector, and the city engineer shall hold their offices until the next general municipal election only and until the election and qualification of their successors.

Sec. 8. No person shall be eligible to the office of mayor unless he possesses the qualifications of an elector at municipal elections, is a citizen of the United States, and shall have resided two years next preceding the election within the limits of the city; and no person shall be eligible to the office of alderman unless, in addition to the above qualifications, he be a resident at the time of his election of the ward from which he may be elected; and if any alderman shall remove from the ward in which he was elected, the city council shall declare his office vacant and a new election shall be ordered to fill the same. No person shall be eligible to any office specifically created by this act unless he possesses the qualifications of an elector at municipal elections: Provided, That if an officer holding an office specifically created herein shall remove from the city, the city council shall declare his office vacant and the same shall be filled in the manner specified in section 15 hereinafter.

Sec. 9. The mayor shall, by proclamation published in some newspaper published in the city, give thirty days notice of all elections, except when the election is held to fill a vacancy, and in that event ten days notice shall be so given. Such proclamation shall state the places at which said election is to be held, the purpose of the election, and the offices, if any, that are to be filled. The city council shall provide the places at which the election is to be held, one in and for each ward: Provided, That when the population of the city shall be twenty-five thousand or more the city council may provide that polls be opened and votes cast in any number of places in each ward, not exceeding three, that may be deemed necessary, and in that event the city council shall have power to require each voter to cast his vote at the voting place in the subdivision of the ward in which he resides. The mayor shall appoint and the board of aldermen confirm the presiding officers of election, each of whom shall be a qualified voter at municipal elections of the ward for which he is appointed and at the election over which he is to preside. In the event that the mayor shall fail to give notice as herein required of any municipal election, the board of aldermen shall at any time within thirty days of the election give such notice; and if both the mayor and the board of aldermen fail to give the notice of election herein provided for, then and in that event any two or more aldermen may give such notice at any time within twenty days of the election. If for any reason the city council shall have failed at the time of the issuance of the notice of election to provide the places at which the election is to be held, the person or persons by whom the notice is given shall provide such places. Except where otherwise herein provided, elec-

tions shall be held, votes counted, and returns made in the same manner as is now or may hereafter be provided for the elections at which members of the legislature are elected.

Sec. 10. The presiding officers and the judges of elections shall have all the powers now or hereafter possessed by the judges of the elections at which members of the legislature are chosen, and in addition thereto they shall have and exercise such additional powers to prevent illegal voting and to maintain the public peace in the neighborhood of the polls as may be conferred on them by the council.

Sec. 11. Returns of elections shall be made to the mayor within twenty-four hours after the completion of the counting of the votes. As soon as all the ballots cast at each voting place shall be counted, they, together with one poll list and one tally list, shall be placed in a wooden or metallic box securely fastened and sealed and within forty-eight hours thereafter shall be delivered by one of the managers of the election to the city clerk, who shall safely keep the same for six months after the election, at which time, unless required in case of a contested election, they shall be by him destroyed. The presiding officer of election shall retain in his custody one of the poll lists and one of the tally lists of the election and shall keep the same in his possession for six months subject to the inspection of any person interested in the election.

Sec. 12. On the first Saturday following every election, or as soon thereafter as possible, the city council shall meet and open and canvass the returns and as-

certain and declare the result of the election. The proceedings of the city council in opening and canvassing the returns shall be entered at large upon the minutes as in other cases, and if the election was held for the election of any officer or officers, the said entry shall show the number of votes received by each candidate at each voting place, the office for which he was a candidate, and the name of the person elected to each and every office. The candidates receiving the highest number of votes respectively sall be declared elected. In case of a tie between two or more candidates for the same office, not all of whom can be elected, the city council shall declare such election void as between such candidates only, and shall immediately order a new election for the office, first giving not less than ten days notice thereof. Every officer elect of whom no official bond is required, and every officer elect of whom an official bond is required, shall qualify within five and ten days respectively after the aforesaid declaration of the result of the election: Provided, That the mayor elect shall in all cases qualify within six days of the aforesaid declaration. If any officer shall fail to qualify within the time herein specified, the city council shall forthwith declare the office vacant, and the same shall be filled as herein provided in section fifteen of this act.

Sec. 13. On the third Tuesday after the general popular municipal election in each and every year ending in an odd number, or as soon thereafter as is practicable, the city council shall elect by ballot the following named officers who shall hold their offices for two years and until the qualification of their successors: a city clerk and such other officers and

agents other than policemen as the corporate necessities may require: Provided, That when the population of the city shall reach twenty-five thousand the office of assessor and collector of taxes may be divided, and there shall be elected, as hereinbefore provided in section 7, an assessor of taxes and a collector of taxes, whose duties, powers, and compensation respectively shall be fixed by the city council as provided in this act. Every person elected to office by the city council or appointed by the mayor shall within twenty days thereafter qualify and enter upon the discharge of his duties, and in default thereof the city council shall declare the office vacant and proceed to fill the same by a new election. And there shall be a chief of police appointed by the mayor, by and with the consent of the board of aldermen, whose term of office shall expire with that of the mayor appointing him. The mayor shall also by and with the consent of the board of aldermen appoint all police officers.

Sec. 14. The recorder shall be learned in the law, and he shall be paid a salary of not less than fifteen hundred dollars per annum, but in no case shall he receive any fees. The other officers and agents of the city, except the aldermen, shall receive for their services such compensation as the city council may ordain. The aldermen shall each receive such a sum, not to exceed five dollars for each session of the city council attended, as the city council may ordain. Provided, That no aldermen shall receive in any one year more than the sum of three hundred dollars.

Sec. 15. When a vacancy shall occur in any office, if the vacancy occurs in an office held by an officer

elected by the people, a special election shall be held to fill the same; if in an office within the elective or appointive power of the city council, the council shall proceed to fill the same; if in an office within the appointive power of the mayor, the vacancy shall be filled by him. The city council shall have power to fill any vacancy occurring in an office ordinarily filled by popular election until a special election can be held. The city council shall provide for filling vacancies in all offices not herein provided for, and in all cases of vacancy the same shall be filled for the unexpired term only: Provided, That whenever a vacancy shall occur by resignation or otherwise in the municipal offices of the city, so that such vacancy cannot be filled under the charter of the city or under the laws of the state in force at the time of such vacancy, then and in that event it shall be the duty of any judge of a Court of record of El Paso County, upon the petition of not less than fifty of the principal tax payers, citizens of the city, at once to order an election to fill such vacancy, giving notice of not less than ten days in the usual manner provided for such elections. During the temporary absence or disability of any officer the city council shall elect some suitable person to discharge the duties of the absent or disabled officer until his return or the removal of his disabilities.

Duties and Powers of Officers.

Sec. 16. Every person elected by the voters of said city to fill any office or by the city council under this act shall before entering upon the duties of his office take and subscribe the official oath prescribed in the constitution of this state, and the city council may

by ordinance require such additional oath as it may deem best calculated to secure faithfulness in the performance of their duties by such officers.

Sec. 17. The mayor shall be the chief executive officer of the city and shall be vigilant and active at all times in causing the laws and ordinances for the government of said city to be duly executed and put in force. He shall inspect the conduct of all subordinate officers in the government thereof, and as far as may be in his power shall cause all negligence, carelessness, and positive violations of duty to be prosecuted and punished. He shall have power whenever in his judgment the good of the city may require it to call special meetings of the city council, and he shall from time to time communicate to that body all such information and recommend all such measures as may tend to the improvement of finances, police, health, security, cleanliness, comfort, ornament and government of the city.

Sec. 18. Whenever the mayor shall deem it necessary in order to enforce the laws of the city, or to avert danger, or to protect life or property in case of riot or any outbreak or public calamity or public disturbance, or when he has reason to fear any serious violation of law or order, or any outbreak, or any other danger to the city or the inhabitants thereof, he shall summon into his services as a special police force all or as many of the citizens as in his judgment and discretion may be necessary and proper, and such summons may be by proclamation or order addressed to the citizens generally or to those of any ward of the city or subdivision thereof, or such summons may be by personal notification; such police

force while in service shall be subject to the orders of the mayor, shall perform such duties as he may require, and shall have the same power while on duty as the regular police force of the city, and any person so summoned and failing to obey, or appearing and failing to perform any duty that may be required by this act, shall be fined in a sum not exceeding one hundred dollars.

Sec. 19. The mayor shall have authority in case of a riot or any unlawful assemblage and with a view to preserve peace and good order in the city to order and enforce the closing of any theater, ball room, grog shop, bar room, tippling house, or other place of resort or public room or building, and may order the arrest of any person violating in his presence the laws of the state or any ordinance of the city, and he shall perform such other duties and possess and exercise such other powers and authority as may be prescribed and conferred by the city council.

Sec. 20. All ordinances and resolutions adopted by the council shall before they take effect be placed in the office of the city clerk, and if the mayor approve thereof he shall sign the same, and such as he shall not sign, he shall return to the city council with his objections thereto. Upon the return of any ordinance or resolution by the mayor the vote by which the same was passed shall be reconsidered, and if after such reconsideration two-thirds of the whole number of aldermen elected agree to pass the same and enter their votes on the journal of their proceedings it shall be in force: Provided, That if the mayor shall neglect to approve or to object to any such ordinance or resolution for a longer period than five days

after the filing with the clerk as aforesaid, exclusive of the day of filing, the same shall go into effect.

Sec. 21. The recorder shall be the chief judicial officer of the city, and as such he shall hold a Court within said city by the name of the recorders Court of the city of El Paso, which said Court shall have jurisdiction and cognizance of all misdemeanors, breaches of the peace, infractions of the ordinances, and all other cases arising under the laws of the city, and shall be deemed always open for the trial of said cases. The said Court shall have full power, authority, and jurisdiction in all cases arising under the ordinances of the city and over any breaches and violaions thereof and of any and all persons thus offending, and to try and determine all suits, actions, and complaints charging a violation of any ordinance of the city, and may grant new trials on motion in writing showing sufficient cause, and all prosecutions, trials, and proceedings had in said Court under this act shall be governed as nearly as may be by the laws and rules regulating trials, prosecutions, and proceedings in justice Courts in force at the time. The recorder may require of any person arrested under the provisions of this act a bond for his good behavior and to keep the peace, with two good and sufficient sureties, which bond shall be payable to the city of El Paso. He shall have full power and authority to issue subpoenas for witnesses and to compel their attendance by process of attachment. He may punish all contempts by fine and imprisonment or either, may issue subpoenas, attachments, writs of capias, warrants of arrest, search warrants, executions and all other process known to law which a justice of the peace of this state may lawfully issue,

and all of said writs and process shall be issued, served, and executed under the same forms and in the same manner as the like process would be when issued by a justice of the peace unless herein otherwise provided. He shall also have full power and authority to administer official oaths and all oaths and affirmations in trials before him. The recorder shall possess and execute in the city in criminal cases all the powers and duties of a justice of the peace, and shall have the same authority and like powers with justices of the peace in the prevention and suppression of crime, but he shall in no case entertain jurisdiction in civil suits. The city council may determine what costs, if any, shall be charged in proceedings in and for the process issued in said Court: Provided, That said costs shall not be in excess of the costs allowed by the laws of the state in like cases. The recorder shall perform such other duties that may be prescribed by any ordinance of the city as may properly and lawfully be required of said officer as the Judge of said Court and are not inconsistent with the laws and constitutions of this state: Provided, That all moneys collected from fines of whatever character imposed by the recorder shall be paid into the city treasury for the use of the city.

Sec. 22. Every person brought before the recorder to be tried for an offense for which the penalty may be fine or imprisonment, or both, shall be entitled if he shall demand it to be tried by a jury of six qualified voters of the city, who shall be summoned, impaneled, and sworn as jurors in justices Courts under the laws of the state.

Sec. 23. In all cases of conviction in the recorders Court the defendant shall have the right of appeal to

the county Court upon the same conditions and in the same manner as nearly as may be as provided in case of appeals in criminal cases from the justices Courts to the county Court; Provided, That whenever the defendant isfined in a sum greater than one hundred dollars or is sentenced to imprisonment the county Court shall have no jurisdiction to entertain the appeal and the defendant may appeal directly to the Court of appeals upon the same conditions and in the same manner as nearly as may be as is provided in case of appeals in criminal cases from the county Courts to the Court of Appeals.

Sec. 24. The chief of police shall attend upon the recorders Court while said Court is in session and shall promptly and faithfully execute all writs and processes issued from said Court. He shall have like power with the sheriff of the county to execute the writ of search warrant. He shall be active in quelling riots, disorder, and disturbances of the peace within the limits of the city, shall take into custody all persons so offending against the peace of the city, and shall have authority to take suitable and sufficient bail for the appearance before the recorders Court of any person charged with an offense against the ordinances or laws of the city. It shall be his duty to arrest without warrant all violators of the public peace, and all who obstruct or interfere with him in the execution of the duties of his office, or who shall be guilty of any disorderly conduct or distrubance whatever. To prevent a breach of peace or to preserve quiet and good order he shall have authority to close any theater, bar room, ball room, drinking house, or any other place or building of public resort; and in the prevention and suppression of crime and

arrest of offenders he shall have, possess, and execute like power, authority and jurisdiction as the sheriff of a county under the laws of the state. He shall receive a salary to be fixed by the city council. The chief of police shall give such bond for the faithful performance of his duties as the city council may require, and he shall perform such other duties and possess such other powers, rights, and authority as the city council may by ordinance require and confer, not inconsistent with the constitution and laws of this state.

Sec. 25. It shall be the duty of the city clerk to attend every meeting of the city council and keep accurate minutes of the proceedings thereof in a book to be provided for that purpose, and to engross and enroll all laws, resolutions, and ordinances of the city council; to keep the corporate seal; to take charge of and preserve and keep in order all the books, papers, records, documents, and files of said council; to countersign all commissions issued to the city officers and licenses issued by the mayor, and to keep a record or register thereof; and to make out all notices required under any regulation or ordinance of the city. He shall draw all warrants on the treasurer and countersign the same and keep an accurate account thereof in a book provided for that purpose. He shall be the general accountant of the city and shall keep in books regular accounts of the receipts and disbursements for the city, and separately under proper heads each cause of receipt and disbursement; and also accounts with each person, including officers, who have money transactions with the city, crediting amounts allowed by proper authority and specifying the particular transaction to which such

entries apply. He shall also keep a register of bonds and bills issued by the city, and all evidences of debt due and payable to it, noting the particulars thereof, and all facts connected therewith as they occur. He shall carefully keep all contracts made by the city council, and he shall do and perform all such other duties as may be required of him by law, ordinance, resolution, or order of the city council. He shall receive for his services an annual salary, payable at stated periods, to be fixed by the city council

Sec 26. The treasurer of the city shall give bond in favor of the city in such amount and in such form as may be required by the city council and with sufficient security to be approved by the city council, conditioned for the faithful discharge of his duties. He shall receive and securely keep all moneys belonging to the city and make all payments for the same upon the order of the mayor, attested by the clerk under the seal of the city : Provided, That no order shall be paidunless the said order shall show upon its face that the city council has directed the issuance and for what purpose. He shall render a full and correct statement of his receipts and payments to the city council at their first regular meeting in every quarter, and whenever at other times he may be required by the council to do so; at the end of every half year he shall cause to be published at the expense of the city a statement showing the amount of receipts and expenditures for the six months next preceding, and the general condition of the treasury; and he shall do and perform such other acts and duties as the city council may require; and for his services he shall receive such compensation as shall be fixed by the city council

Sec. 27. The assessor and collector shall make up the assessment of all property taxed by the city and make duplicate rolls thereof, and on completion of the rolls shall deliver one of them to the city clerk. He shall collect all taxes due the city, and in the event of non-payment of any taxes shall proceed to sell property to raise the amount of taxes so due; and shall in the performance of their duties observe the provisions of this act and the ordinances of the city relating thereto. He shall give bond in such amount and in such form as the city council may prescribe, with good and sufficient sureties. He shall at the expiration of every week pay to the city treasurer all moneys by him collected, and shall report to the city council at the first meeting in every month all moneys so collected and paid; and he shall perform all such other duties and in such manner and according to such rules and regulations as the city council may prescribe. The assessor and collector is authorized to require the owners of all property subject to taxation to render a correct account of the same under oath to be administered by him. The assessor and collector shall receive such fees and commissions for his services as may be allowed by the ordinances of the city.

Sec. 28. The city attorney shall attend all meetings of the council and shall draw up all the ordinances of the city. He shall, when so requested, give advice in writing to the city council, the mayor, the treasurer, chief of police, health physician, or assessor and collector. He shall prosecute or defend as the case may be all suits or cases to which the city is a party and pending in any Court sitting in El Paso County or appealed from any of said Courts. He shall attend the

sessions of the recorders Court either in person or by deputy, and prosecute all persons charged with offenses therein, and for which purpose he may appoint a deputy. He shall approve the form of all contracts to which the city is a party, and of all official bonds, and in general shall do and perform all and every service of a professional nature that he may be required to do by the city council.

Sec. 29. It shall be the duty of the city engineer to make all surveys of such streets, alleys, lanes, blocks, lots, or other grounds within or without the city as the city council shall direct; to establish permanent monuments in all such surveys in such manner as to protect them as far as possible from destruction by fire, traffic, or other cause; to make all surveys of lots, blocks, or other grounds within the city for private individuals when called upon by them to do so, of which surveys when so completed he shall give certificates to such individuals as may require them; to take the levels, establish bench-marks at convenient distances, and report to the city council the proper grades for all such streets, alleys, and all other public or private grounds as the council may direct; to have a general supervision of all grading and other public works of a permanent character done for the city and not otherwise provided for, and to see that such improvement is done according to grade, ordinance, and contract; to prepare plans and specifications for the construction of all such works, which plans and specifications shall be submitted to the council for approval; and to perform all other duties not inconsistent with the nature of his office which the city council may require. He shall keep in his office a record book wherein a plat of every survey

made by him within the city limits shall be placed and indexed, also grade maps which have been approved and made official by the council, and a correct list of benchmarks with their descriptions and locations. He shall also keep in his office a book of levels containing a true copy of all the original notes of the levels of the streets, alleys, or other grounds taken by him for any purpose relating to his office. He shall also keep in his office a book in which he shall record all estimates made by him on public works. He may employ by and with the consent of the council such assistants as may be necessary for the proper prosecution and discharge of his duties. All instruments, engineer materials, statements, and other supplies that shall be required for the office of the city engineer shall be furnished him by the city as the council shall direct. It shall be the duty of the committee on streets and grades to examine at least every three months all books and records of the office and report the condition of the same to the city council.

Sec. 30. The city council shall have power from time to time to require (other) and further duties of all officers whose duties are herein prescribed, and to define and describe the powers and duties of all officers appointed or elected to any office under this act whose duties are not herein specially defined, and to fix their compensation.

Sec. 31. The city council may require bonds to be given to the city by all officers for the faithful performance of their duty. Whenever the city council shall be of the opinion that the bond of any city officer is defective or insufficient, it may require the

officer to give a new bond, and if such officer fails to comply with the order of the city council for the space of ten days his office shall be declared vacant by the city council and shall be filled as herein provided in the case of vacancy otherwise created. All official bonds shall be payable to the mayor and to his successors in office and shall be approved by the city council, and the validity of no official bond shall be affected by any subsequent increase or change in the official duties of the office made by the city council by virtue of the powers in it herein vested.

General Powers and Duties of the City Council.

Sec. 32. The mayor and the board of aldermen shall constitute the city council of the city. The city council shall meet at such times and places as it shall by resolution direct. The mayor when present shall preside at all meetings of the city council, and shall in all cases of tie have a casting vote. In case of the absence of the mayor from any meeting of the city council, the board of aldermen may elect an alderman to preside at that meeting. In case of the absence of the mayor from the city or his disability to perform the duties of the office, the board of aldermen may elect an alderman to fill the office of mayor until the mayor shall return or shall be able to resume the duties of the office. Any three members of the board of aldermen may call a special meeting of the city council. All calls for special meetings whenever issued by the mayor or by members of the board of aldermen shall be in writing and shall state the object of the meeting, and no business shall be transacted at said meeting other than that specified in the call.

Sec. 33. The city council shall hold stated meetings. Petitions and remonstrances may be presented to the council in writing only. The council shall determine the rules of its proceedings and shall be the judge of the election and qualifications of its own members, and may punish them for disorderly conduct.

Sec. 34. The city council shall have the management and control of the finances and property, real, personal, and mixed, belonging to the city: Provided, That no suit of any nature whatever shall be maintained against the city of El Paso unless the plaintiff therein shall aver and prove that previous to the filing of his petition he applied to the city council in writing for redress, satisfaction, compensation, or relief, as the case may be, and that the same was by the city council refused.

Sec. 35. The city council shall have power to appropriate money and to provide for payment of debts and expenses of the city.

Sec. 36. To provide by ordinance special funds for special purposes and to make the same disbursable only for the purpose for which the fund was created, and any officer of the city misappropriating said special fund shall be deemed guilty of malfeasance in office and shall upon trial and conviction be removed from office and be incapable thereafter to hold any office in the city.

Sec. 37. To make regulations to prevent the introduction or spread of contagious diseases within the city; to make quarantine laws for that purpose and to enforce them within the city and within ten miles thereof; to enforce vaccination.

Sec. 38. To establish or erect, or cause to be established or erected, markets and market houses; to designate, regulate, and control market places and privileges, and to inspect and determine the mode of inspecting meats, birds, fowls, fish, vegetables, fruits, milk, and every article of food or drink intended for human use or consumption, or which may be used in the composition or preparation of such food or drink brought into, held, or offered for sale in the city, and to seize and destroy any decayed or unwholesome fruit or vegetables, any impure or unhealthy or unwholesome meats, birds, fowls, or fish, or any milk which has been watered, adulterated, reduced, or changed in any respect by the addition of water or other substance by the removal of cream; and to regulate, license, control, or prevent the sale or the keeping for sale on the public streets, squares, and alleys of any article of food or drink, or any goods, wares, or merchandise of any kind whatever.

Sec. 39. To erect or establish one or more hospitals, and to control and regulate the same; and to prohibit or to permit and regulate the establishment of private hospitals.

Sec. 40. To make such rules and regulations in regard to butchers as it may deem necessary and proper.

Sec. 41. To regulate the inspection of beef, pork, flour, meal, salt, and other provisions; whisky and other liquors to be sold in barrels, hogsheads, and other vessels and packages; to appoint weighers, gaugers, and inspectors, to prescribe their duties and regulate their fees.

Sec. 42. To abate all nuisances which may injure, or affect the public health or comfort in any manner they may deem expedient.

Sec. 43. To do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of diseases.

Sec. 44. To cooperate with the commissioners Court of the county of El Paso in making such improvements connected with the city and county as may be deemed by the city council and the commissioners Court necessary to improve the public health and to promote efficient sanitary regulations; and by mutual arrangement they may provide for the construction of such improvements and the payment therefor.

Sec. 45. To compel the owner or occupant of any grocery, soap, tallow, or chandler establishment, or blacksmith shop, tannery, stable, slaughter house, distillery, brewery, sewers, privy, hide houses, or other unwholesome or nauseous house or place, to cleanse, remove, or abate the same as may be necessary for the health, comfort, and convenience of the inhabitants.

Sec. 46. To direct the location of business, tanneries, blacksmith shops, livery stables, and manufacturing establishments; to direct the location of and regulate the management and construction, or to restrain, abate, and prohibit within the city limits slaughtering establishments, hide houses, or establishments for keeping or curing hides, establishments for making soap, for steaming or rendering lard, tallows, offal, and such other substances as may be rendered,

and all establishments or places where any nauseous, offensive, or unwholesome business may be carried on.

Sec. 47. To regulate the burial of the dead, and to prohibit public funerals in case of death from any contagious or infectious disease; to purchase, establish, and regulate one or more cemeteries; to regulate the registration of marriages, births, and deaths; to direct the returning and keeping of bills of mortality, and to impose penalties on physicians, ministers, sextons, and other for any default in the premises.

Sec. 48. To abate and remove nuisances, to punish the authors thereof by penalties, fines, and imprisonment, and to define and declare what shall be nuisances and authorize and direct the summary abatement thereof.

Sec. 49. To require all owners of private ditches, drains, sinks, and privies to wall up, cover up, fill up, cleanse, drain, alter, relay, repair, fix or improve the same as may be ordered by any resolution or ordinance of the city and in the event of any failure, neglect, or refusal to comply with any such order the party so failing shall be liable to fine and imprisonment. In the event of there being no person in the city on whom such order can be served, the city may have such work done and such improvements made on account of the owner thereof, and all costs, charges, and expenses ahll be a lien on the property on the filing of a memorandum by the mayor under the seal of the city and recording the same with the clerk of the District Court, and the city may enforce said lien and institute suit in the corporate name and

obtain judgment against said party for the amount so due as aforesaid in any Court having jurisdiction.

Sec. 50. To prevent any person from bringing, depositing, or having within the limits of the city any dead animal or other offensive or unwholesome substance or matter, and to require the removal or destruction by any person who shall have on his premises, or shall have placed or caused to be placed upon or near his premises or elsewhere in the city, any substance or matter, filth, or any putrid or unsound meat, fish, hides, or skins, fruit or vegetables, and in his default to authorize the removal or destruction thereof by some officer of the city; to require the owner of any dead animal to remove the same to such place as may be designated.

Sec. 51. To secure the sanitary condition of tenement houses, jails, prisons, and all public buildings within the city limits.

Sec. 52. To prevent the erection on the banks of streams or ditches of factories or other establishments which will befoul or make impure their waters.

Sec. 53. To regulate and control the consttuction, the location, the method, or manner of emptying or cleansing, and the time or frequency of cleansing of all cesspools or privy vaults, or other description of privies, and to prohibit cesspools or privy vaults within the city or any part thereof.

Sec. 54. To inspect all buildings and establishments used for educational or asylum purposes; to see that the inmates thereof are properly treated, and to regu-

late all institutions of whatever nature used as asylums, colleges, or boarding schools, and to require the managers thereof to make a report of the number of inmates, and sanitary condition of the same every month.

Sec. 55. To require any cellar, room, tenement, or building in the city limits occupied as a dwelling place which has become by reason of the number of occupants, want of cleanliness, or other cause, unfit for such purpose, and a cause of nuisance or sickness to the occupants, or the public, to be put into proper condition as to cleanliness, or to require the occupants to quit the premises; to cause the premises to be properly cleaned at the expense of the owner, or to remove the occupants forcibly, and to close up the premises and not allow the same to be occupied again as a dwelling place without the consent of the board of health.

Sec. 56. To provide or cause to be provided the city with water; to make, regulate, and establish public wells, pumps, and cisterns, hydrants and reservoirs in the streets or elsewhere within the city or beyond the limits thereof for the extinguishment of fires and the convenience of the inhabitants; to prevent the unnecessary waste of water, and to make, establish, and regulate all irrigation ditches and have entire control of the same.

Sec. 57. To have the exclusive control and power over the streets, alleys, and public grounds and highways of the city, and to abate and remove encroachments thereon; to open, alter, widen, extend, establish, regulate, grade, clean, or otherwise improve said

strets; to put drains or sewers therein; and to prevent the encumbering thereof in any manner, and to protect the same from any encroachment or injury; and to regulate and alter the grade in premises, and to require the filling up and raising of the same; to alter and establish the channels of any ditches or water courses within the limits of the city when the health, safety, or convenience of the city may require such to be done, and to wall up or cover said ditches or canals: Provided, That the city shall not be liable in damages at the suit of any person for injuries, either to the person or the property, arising from the unsafe condition or want of repair of any street, square, alley, or sidewalk, unless at least ten days before the injury occurs a notice in writing shall have been filed with the city clerk specifically pointing out the nature and exact locality of the defect, obstruction, or other thing that afterwards occasions it.

Sec. 58. To establish, erect, construct, regulate, and keep in repair bridges, culverts, and sewers, sidewalks, and crossways, and to regulate the construction and use of the same, and to abate and punish any obstruction or encroachment thereon.

Sec. 59. To provide for lighting the streets by gas, electricity, or otherwise, and for erecting lamp posts and lamps therein; to regulate the lighting thereof, and from time to time to create, alter, or extend lamp districts; and exclusively to regulate, direct, and control the laying and repairing of the gas pipes and gas fixtures in the streets, alleys, sidewalks, and elsewhere.

Sec. 60. To provide for enclosing, regulating, and improving all public grounds and cemeteries belonging to the city, and to direct and regulate the planting and preserving of ornaments and shade trees in the streets, alleys, sidewalks, or public grounds.

Sec. 61. To regulate the carrying of weapons and to prevent the carrying of the same concealed.

Sec. 62. To prevent the encumbering of the streets, allys, sidewalks, and public grounds with carriages, wagons, carts, hacks, buggies, or any vehicles whatsoever, boxes, lumber, timber, firewood, posts, awnings, signs, or any other substance or material whatever or in any other manner whatever; to compel all persons to keep all weeds, filth, and any kind of rubbish from the sidewalks, streets, and gutters in front of the premises occupied by them; to require and compel the owners of property to fill up, grade, level, and otherwise improve the sidewalks in front and adjoining their property; and to inspect the construction of buildings, to cause unsafe buildings to be made safe or to be removed, and to prohibit the use of material deemed unsafe.

Sec. 63. To license and tax merchants, commission merchants, hotel and inn keepers, drinking houses or saloons, bar rooms, beer saloons, and all places or establishments where intoxicating or fermented liquors are sold; brokers, money brokers, real estate agents, insurance agents, insurance brokers, and auctioneers, and all other trades, professions, occupations, and callings, the taxing of which is not prohibited by the constitution of the state, which tax shall not be construed to be a tax on property.

Sec. 64. To license, tax, and regulate or to suppress and prevent hawkers, peddlers, pawnbrokers, and keepers of theatrical and other exhibitions, shows, and amusements.

Sec. 65. To license, tax, and regulate, or to prohibit circuses, the extortions of common showmen, and of shows of any kind and the exhibitions of natural or artificial curiosities, caravans, menageries, and musical exhibitions and performances.

Sec. 66. To license, tax, and regulate hackmen, draymen, omnibus drivers, and drivers of baggage wagons, porters, and all other pursuing like occupations with or without vehicles; to prescribe their compensation and to provide for their protection; and to make it a misdemeanor for any person to attempt to defraud them of any legal charge for services rendered, and to regulate, license, and restrain runners for railroads, stages, and public houses.

Sec. 67. To license, tax, and regulate billiard tables, pin alleys, and ball alleys, to suppress and restrain disorderly house, tippling shops and groceries, gambling, and gaming houses, lotteries and all fraudulent devices and practices within the limits of the city.

Sec. 68. To authorize the proper officers of the city to grant and issue licenses and to direct the manner of issuing and registering thereof and the fees and charges to be paid therefor; but no license shall be issued for a longer period than one year, and shall not be assignable except by permission of the city council.

Sec. 69. To prohibit the selling or giving away indirectly, to evade a tax or penalty, of intoxicating or malt liquors by any person within the city; to forbid or punish the selling or giving away of any intoxicating or malt liquors to any minor, apprentice, or habitual drunkard.

Sec. 70. The city council shall have full power to prevent by ordinance the sale or giving away of any intoxicating liquors in any house or other place where theatrical or dramatic representations are given, and also to prevent intoxicating liquors of any description being brought into any house or place where such representations are given under any pretext whatever.

Sec. 71. To regulate the weight and quality of the bread to be sold or used within the city.

Sec. 72. To create, establish, and regulate the police of the city and to prescribe their duties, powers, and compensation.

Sec. 73. To suppress and prevent any riot, affray, noise, disturbance, or disorderly assembly in any public or private place within the city.

Sec. 74. To prevent, prohibit, and suppress horse racing or immoderate riding or driving on the streets; to prohibit and punish the abuse of animals; and to compel persons to fasten horses or other animals, whether attached to vehicles or not while standing or remaining on the streets.

Sec. 75. To restrain and punish vagrants, mendicants, street beggars, and prostitutes.

Sec. 76. To establish and regulate public pounds, and to regulate, restrain, and prohibit the running at large of horses, mules, cattle, sheep, swine, and goats; to authorize the distraining, impounding, and sale of the same for the costs of the proceedings and the penalty incurred, and to order their destruction when they can not be sold; and to impose penalties on the owners thereof for a violation of any ordinance

Sec. 77. To tax and regulate or to restrain and prohibit the running at large of dogs, and to authorize their destruction when at large contrary to ordinances and to impose penalties on the owners or keepers thereof for violations of such ordinances.

Sec. 78. To prohibit and restrain the firing of firecrackers, guns, and pistols, the use of velocipedes, or the use of any pyrotechnics, or any other amusements or practices tending to annoy persons passing in the streets or sidewalks or to frighten horses or teams; to restrain and prohibit the ringing of bells, blowing of horns or bugles, crying of goods and all other noises, practices, and performances tending to the collection of persons on the streets and sidewalks by auctioneers and others for the purpose of business, amusements, or otherwise.

Sec. 79. To erect and establish one or more work houses or houses of correction within or without the city limits, and to make all necessary rules and regulations thereof and to appoint all necessary keepers or assistants. In such work houses or houses of correction may be confined all vagrants, stragglers, idle, suspicious, and disorderly persons who may be committed by the recorder, and any person who shall fail

or refuse to pay the fine, penalty, or costs imposed for any misdemeanor or breach of any ordinance of the city may, instead of being committed to jail, be kept therein subject to labor and confinement.

Sec. 80. To compel and force all offenders against any ordinance of the city found guilty by the recorder and sentenced to fine and imprisonment to labor on the streets and alleys of the city or on any public work under such regulations as may by ordinance be established.

Sec. 81. To prevent all trespasses, breaches of the peace and good order, assaults and batteries, quarreling, using abusive, obscene, profane, and insulting language, misdemeanors, and all disorderly conduct, and to punish all persons thus offending; to define and suppress disorderly houses, and to make the keeping or frequenting thereof an offense.

Sec. 82. To prevent and punish the keeping of all houses wherein indecent, loud, or immodest dramatic or theatrical representations are given, or bawdy houses of prostitution or assignation within the city, and to adopt summary measures for the removal or suppression of all such establishments.

Sec. 83. To direct and control the laying and constructing of railroad tracks, turn outs, and switches, or to prohibit the same in the streets, avenues, and alleys unless the same shall have been authorized by law, and the location of depots within the city; to require that railroad tracks, turn outs, and switches shall be so constructed as to interfere as little as possible with the ordinary travel and use of streets, avenues, and alleys, and that sufficient space shall

be left on either side of said track for the safe and convenient passage of teams, carriages, and other vehicles and persons; to require railroad companies to keep in repair the streets, avenues, or alleys through which their trains may run, and if ordered by the city council to construct and keep in repair suitable crossings at the intersections of streets, avenues, and alleys, and to construct and keep in repair ditches, sewers and culverts when the city council shall deem it necessary; to direct the use and regulate the speed of locimotive engines in the city, or to prevent and prohibit the use or running of the same within the city: Provided, That the provisions of this section shall apply to railroads known as steam railroads, and not city, street, or horse railroads.

Sec. 84. The city council shall have power to assess and collect the municipal taxes upon city or horse railroads; to compel said city railroad companies to keep their roads in repair; to require that tracks, turn outs, and switches shall be so constructed as to interfere as little as possible with the ordinary travel and use of the streets, avenues, and alleys; to make them conform to the grades of the streets upon which their tracks may be laid whenever said streets shall have been graded by the city; to restrain the rate of speed so as not to exceed seven miles per hour; and to compel said city railroads to supply ample accommodation for the safe and convenient travel of the people on the streets where their tracks are run; and the city council may enforce these regulations by proper ordinances with suitable penalties for any violation of said ordinances.

Sec. 85. To prevent or to regulate and control the driving of cattle, horses, and all other animals into or through the city.

Sec. 86. The city council shall have power to pass, publish, amend, or appeal all ordinances, rules, and police regulations not contrary to the constitution of this state, for the good government, peace, and order of the city and the trade and commerce thereof, that may be necessary or proper to carry into effect the powers vested by this act in the city government or any department or officer thereof; to enforce the observance of all such rules, ordinances, and police regulations, and to punish violations thereof by fines, penalties, and imprisonment in the prison, work house, or houses of detention, or to work on the streets or other public works, in the discretion of the Court before whom conviction may be had; but no fine or penalty shall exceed one hundred dollars nor the imprisonment fifteen days for any one offense, unless a larger fine and a longer period of imprisonment are herein allowed: Provided, That the city council by a vote of two-thirds of all the aldermen elected may make the violation of any city ordinance punishable by a fine of not more than five hundred dollars, or by imprisonment not to exceed thirty days, or by both such fine and imprisonment. For any fine, penalty, and costs imposed by the recorder in the trial of any cause or complaint before him, execution may issue to collect such fines and costs, to be levied and executed in the same manner that executions are from the District Court. The same shall be issued by the recorder to the chief of police, who in levying on property and selling shall have like power and authority as the sheriff of the county in execu-

tions issued from the District Court; and the laws of the state, as far as applicable, shall apply to and be in full force and effect as to the executions issued from the recorders Court; and any person upon whom any fine or penalty is imposed may be committed until the payment of the same, with costs, and in default thereof may be imprisoned in the city prison or work house or house of correction, or may be required to work on the streets or other public works of the city for such time and in such manner as may be provided by ordinance: Provided, That such imprisonment or forced labor shall not exceed that imposed on persons who fail to pay the fines of like amount or penalty assessed by the county Court.

Sec. 87. To pass all necessary ordinances to provide for funding or compromising the whole or any part of the existing debt of the city or any future debt: Provided, That unless herein otherwise specified such debt shall be funded or compromised in accordance with the general laws of the state in force at the time and applicable to cities.

Sec. 88. For the purpose of permanently improving the streets, erecting public buildings, constructing or acquiring canals for supplying the city with water, providing water works and other permanent public improvements, the city council shall have power to borrow money upon the credit of the city, and to issue coupon bonds of the city therefor in such sum or sums as it may deem expedient, to bear interest not exceeding eight per cent per annum, payable semi-annually at such place as may be fixed by city ordinance: Provided, That the aggregate amount of bonds issued by the city council and outstanding and unre-

deemed shall at no time exceed six per cent of the value of the property within the city subject to ad valorem tax.

Sec. 89. No bonds shall be issued unless the same shall have been ordered by the city council at the regular meeting thereof by a two-thirds majority of all the members elected; nor then until the action of the city council has been ratified by a majority of the ad valorem tax payers of the city at an election held for the purpose of determining whether or not such bonds shall be issued. All bonds shall specify for what purpose they were issued, and shall not be sold for less than their par value; and when any bonds are issued by the city a fund shall be created to pay the interest and create a sinking fund to redeem the bonds, which fund shall not be diverted nor drawn upon for any other purpose, and the city treasurer shall honor no drafts on said fund except to pay interest upon or redeem the bond for which it was provided.

Sec. 90. Said bonds shall be signed by the mayor and countersigned by the clerk, and shall be payable at such places and at such times as may be fixed by ordinance of the city council, not less than five nor more than fifty years.

Sec. 91. It shall be the duty of the mayor whenever any bond or bonds are issued to forward the same to the comptroller of public accounts of the state, whose duty it shall be to register said bond or bonds in a book kept for that purpose, and to indorse on each bond so registered his certificate of registration, and to give at the request of the mayor his certificate

certifying to the amount of bonds so registered at his office up to date.

Sec. 92. It shall be the duty of the mayor at the time of forwarding any of said bonds for registration to furnish the comptroiler with a statement of the value of all taxable property, real and personal, in the city; also with a statement of the amount of tax levied for the payment of interest and to create a sinking fund. It is hereby made the duty of the comptroller to see that a tax is levied and collected by the city sufficient to pay the interest semi-annually on all bonds issued, and to create a sinking fund sufficient to pay the said bonds at maturity, and that said sinking fund is invested in good interest-bearing securities.

Sec. 93. The city council shall have power by ordinance annually to levy and collect taxes on the assessed value of all property, real and personal, in the city not exempt from taxation by the constitution and laws of the state to the amount and for the purpose specified hereinafer, as follows, to-wit:

First—Taxes not exceeding one per cent of the assessed value of such property for the purpose of defraying the current municipal expenses and to pay debts heretofore contracted. Secondly—Taxes not exceeding one-half of one percent of the value of such property to construct or acquire water works, gas works, canals, public grounds or buildings, and to improve the streets, and to make other permanent and public improvements. Thirdly—Taxes not exceeding one-half of one per cent of the assessed value of such property to maintain the public free schools:

Provided, That no tax shall ever be levied except with the consent of two-thirds of all the aldermen elected at the regular meeting of the city council.

Sec. 94. No debt shall ever be created by the city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and to create a sinking fund of at least two per cent thereon.

Sec. 95. The city council shall have power to levy and collect an annual poll tax not to exceed one dollar from every male inhabitant of the city over the age of twenty-one years, who is a resident thereof at the time of such annual assessment and not exempt by law therefrom.

Sec. 96. The city council shall have power to levy and collect occupation taxes from all persons pursuing any occupation taxed by the state: Provided, That in no case shall any occupation tax exceed one-half of that collected by the state from the same occupation.

Sec. 97. The occupation tax shall be collected by the assessor and collector, and shall be paid to that officer by each and every person and firm owing such tax and before engaging in any trade, profession, business, calling, vocation, or occupation subject to said tax, and if any person shall engage in any business, calling, vocation, or occupation which by an ordinance of the city is subject to an occupation tax without first having paid said tax, he, she, or they shall on conviction before the recorders Court be liable to imprisonment or a fine of ten dollars or

both such fine and imprisonment for each day such violation of said ordinance may continue, and this article shall apply to all persons owing such tax and failing to pay the same: Provided, That the city council may collect said occupation tax by suit in any Court having jurisdiction under such rule and regulations as it may provide by ordinance, and said tax shall not be construed to be a tax on property. The council may require all persons paying occupation taxes to take out licenses, which shall be receipts therefor.

Sec. 98. The term real estate or property, as used in this act, shall be construed to include lots, land, and all buildings or machinery and structures of every kind erected upon and affixed to the same.

Sec. 99. The term personal estate or property, as used in this act, shall be construed to include all household furniture, moneys, goods, capital, chattels, public stocks and stocks of corporations, moneyed or otherwise, and generally all property which is not real.

Collection of Taxes.

Sec. 100. The city council shall have full power to provide by ordinance for the prompt collection of all taxes assessed, levied, and imposed under this act and due or becoming due to said city; and is hereby authorized and to that end may and shall have full power and authority to sell or cause to be sold real as well as personal property, and may and shall make all such rules and regulations and ordain and pass all such ordinances as they may deem neces-

sary to the levying, laying, imposing, assessing, and collecting of any of the taxes herein provided.

Sec. 101. The city council shall have power by ordinance to regulate the manner and mode of making out tax lists or inventories and appraisement of property therein; to prescribe the oath that shall be administered to each person on such rendition of property, and to prescribe how and when property shall thus be rendered; to prescribe the number and form of assessment rolls; and to fix the duties and define the powers of the assessor and collector; and to adopt such measures as ti may deem advisable to secure the assessment of all property within the limits of the city, and to collect the tax thereon; and the council may by ordinance provide that any person, firm, or corporation having property subject to taxation or being liable for any tax under the provisions of this act, and neglecting to render a list, inventory, and appraisement thereof, as required by ordinance of said city, shall be liable to fine and imprisonment.

Sec. 102. Every person, partnership, and corporation owning any property within the limits of the city, shall within two months after published notice hand to the assessor and collector of the city a full and complete inventory of the property possessed or controlled by him, her, or them within said limits not exempt from taxation, on the first day of March of the current year, verified as required by ordinance; and any person failing or refusing to comply with the provisions of this section shall be liable to fine and imprisonment; and the city council shall by ordinance clearly define the duties of tax payers herein, and make all necessary rules and regulations to secure

the rendition of property and the collection of taxes due thereon.

Sec. 103. Except where herein otherwise provided, taxes shall be assessed and collected as may be in the same manner that the state and county taxes are or may hereafter be assessed and collected; and the city shall have all the powers and remedies to secure and enforce the payment of taxes that are now or may hereafter be in existence to secure and enforce the payment of state and county taxes. Except where herein otherwise provided, the assessor and collector shall as nearly as may be governed in the discharge of his duties by the laws, rules and regulations that now or may hereafter apply to and govern the assessors and the collectors of state and county taxes in discharge of their duties as such; and shall have and exercise as nearly as may be the same powers as are now or may hereafter be conferred on the assessors and collectors of state and county taxes.

Sec 104. The city council shall be a board of equalization, and three aldermen and the mayor or any five aldermen without mayor, shall constitute a quorum of said board.

Sec. 105. The board of equalization shall convene annutally at the time fixed by the city council to receive all the assessment lists or books of the assessor of the city for examination, correction, equalization, appraisement and approval, and at all meetings of said board the city clerk shall act as secretary thereof.

Sec. 106. The board of equalization shall cause the assessor to bring before it at the time fixed for the

convening of said board all the assessment lists or books of the assessor of the City for its examination, that it may see if each and every person has rendered his property at a fair market value; and said board shall have power to send for persons and papers, to swear and qualify persons who testify, to ascertain the value of such property; and if they are satisfied it is too high they shall lower it to its proper value, and if too low they shall raise the value of such property to a proper figure. Said board shall also have power to correct any errors that may appear on the assessor's lists or books.

Sec. 107. The board of equalization shall equalize as nearly as possible the value of all the improved lots within the corporate limits of the city, having reference to the size and location of said lots and the improvements thereon, and shall equalize the value of unimproved lots as nearly as possible, having reference to the size and location thereof; and all other property of the same kind shall be made as nearly equal as possible. Any person may file with said board, at any time before the final action of said board, a complaint as to the assessment of his or any other person's property, and said board shall hear said complaint, and said complainant shall have the right to have witnesses summoned in sustaining said complaint, as to the insurance on said property, or the rents and profits it may bring the holder thereof.

Sec. 108. The city assessor, at the same time that he delivers to said board his lists and books as provided in section 106 of this act, shall also furnish said board a certified list of the names of all persons

who refuse either to swear or qualify or to sign the oath or affirmation as required by law, together with a list of the property of such persons situated within the corporate limits of the city as made by him through other information; and said board shall examine said lists and appraise the property so listed by the assessor.

Sec. 109. In all cases where the board of equalization shall find it their duty to raise the value of any property appearing on the lists or books of the assessor they shall, after having fully examined such lists or books and corrected all errors appearing there in, adjourn to a day not less than ten nor more than thirty days from the day of adjournment, such day to be fixed in the order of adjournment, and shall cause the secretary of said board to give written notice to the owner of such property or to the person rendering the same of the time to which the board may have adjourned, and such owner or person rendering said property may at that time appear and show cause why the value of said property should not be raised, which notice may be served by depositing the same, properly addressed and postage paid, in the city post office.

Sec. 110. The board of equalization shall meet at the time specified in said order of adjournment and shall hear all persons the value of whose property has been raised, and if said board is satisfied it has raised the value of such property too high it shall lower the same to its proper value.

Sec. 111. The board of equalization after it has finally examined and equalized the value of all prop-

erty on the assessor's lists or books, shall approve said lists or books and return them together with the lists mentioned in section 108 of this act, that he may make up therefrom his general rolls as required by law; and when said general rolls are so made up the board shall meet again to examine said rolls and approve the same if found correct.

Sec. 112. The action of said board at the meeting provided for in section 111 of this act shall be final and shall not be subject to revision by said board or by any tribunal thereafter.

Sec. 113. Before the board shall enter upon its duties the members thereof shall be sworn by any officer authorized by law to administer oaths faithfully and impartially to discharge all duties incumbent upon them as such board.

Fire Department.

Sec. 114. The city council, for the purpose of providing against the calamities of fire may prohibit the erection, building, placing, moving, or repairng of wooden buldings within such limits of the cty as it may designate and prescribe; and may within said limits prohibit the moving or putting up of any wooden buildings from without said limits; and may also prohibit the removal of any wooden building from one place to another within said limits; and may direct, require, and prescribe that all buildings within the limits so designated and prescribed as aforesaid shall be made or constructed of fire proof materials, and to prohibit the building or repairing of wooden buildings within the fire limits when the same

shall have been damaged to the extent of fifty per cent of the value thereof, and may prescribe the manner of ascertaining such damage; and may declare all dilapidated buildings nuisances and direct the same to be repaired, removed, or abated in such a manner as it shall prescribe and direct; and may declare all wooden buildings in the fire limits which it deems dangerous to contiguous buildings or in causing or promoting fires to be nuisances and require and cause the same to be removed in such manner as they shall prescribe.

Sec. 115. The city council shall have power to prevent and prohibit the dangerous condition of chimneys, flues, fire places, stove pipes, ovens, or any other apparatus used in or about any building or manufactory, and to cause the same to be removed or placed in a secure and safe condition when considered dangerous.

Sec. 116. To prevent the deposit of ashes in places where they would be liable to produce fire or in any wooden box or barrel or within any wooden building, and to appoint one or more officers to enter all buildings and inclosures to examine and discover whether the same are in a dangerous state, and to cause such as may be dangerous to be put in a safe condition.

Sec. 117. To require the inhabitants to keep and provide as many fire buckets and ladders or other means to reach the roof as it shall prescribe, and to regulate the use thereof in times of fire.

Sec. 118. To regulate and prevent the carrying on of manufactories and works dangerous in promoting

or causing fires; to prohibit or regulate the building and erection of cotton presses and sheds.

Sec. 119. To direct, regulate, or prohibit the keeping or storing within the city limits of gunpowder or any other explosive or dangerous materials, and to regulate the conveying ofthe same.

Sec. 120. To regulate and prescribe the manner and to order the building of parapet and party walls.

Sec. 121. To compel the owners or occupants of houses or other buildings to have scuttles in their roofs and stairs or ladders leading to the same.

Sec. 122. To authorize the mayor, officers of fire companies, or any other officers of the city, to keep away from the vicinity of any fire all idle, disorderly, and suspicious persons, and to arrest and imprison the same, and to compel all officers of the city and all other persons to aid in the extinguishment of fires and in the preservation of property exposed to danger thereat and in preventing goods from being stolen.

Sec. 123. And generally to establish such regulations for the prevention and extinguishment of fires as the city council may deem expedient.

Sec. 124. The city council shall have power to organize and maintain a fire department: Provided, That all volunteer fire companies shall elect their own officers, subject to the approval of the city council.

Sec. 125. When any building in the city is on fire it shall be lawful for the mayor or the chief or acting chief of the fire department to direct such building, or any other buildings which he may deem hazardous and likely to take fire and communicate to other buildings, to be torn down or blown up or destroyed, and no action shall be maintained against any person or against the city therefor; but any person interested in any building so destroyed or injured may within six months and not thereafter apply in writing to the city council to assess and pay the damage he has sustained; and if the city council and the claimant can not agree on the terms of adjustment then the application of such claimant shall be referred to three commissioners, one to be appointed by the claimant, one by the city council, and the third by both; they shall be sworn faithfully to execute their duty ccording to the best of their ability, shall have power to subpoena and swear witnesses, and shall give all parties a fair and impartial hearing, and shall give notice of time and place of meeting; said commissioners shall be qualified voters and owners of real estate in the city, shall take into account the probabilities whether the said building would have been destroyed by fire if it had not been so pulled down or destroyed, and the loss of insurance, upon said property, if any, caused by pulling down, blowing up, or destroying said building, and may report that no damage should equitably be allowed such claimant.

Sec. 126. When a report shall be made and finally confirmed for the appraising of said damges a compliance with the terms thereof by the city council shall be deemed a full satisfaction of said damages.

Sanitary Regulations.

Sec. 127. There shall be created a board of health, which shall consist of six citizens from the city at large, all of whom shall be taxable inhabitants of the city, one of whom shall be a practicing physician and one a lawyer. Four members of the board shall constitute a quorum. They shall be appointed by the mayor with the approval of a majority of the city council at their first annual meeting or as soon thereafter as practicable at a regular meeting. Two shall be appointed for three years, two for two years, and two for one year; and annually thereafter the mayor with like approval shall appoint two members of said board for the term of three years, and all vacancies shall be filled in like manner for the unexpired terms. And they shall be subject to suspension and removal as in cases of other officers of the city.

Sec. 128. The board of health shall have general supervision over the public health of the city, and for that purpose it is authorized and empowered to make such rules and regulations, not to conflict with the ordinances of the city or the laws of the state, as it may deem best to promote and preserve the health of the city; to enforce the observance of its rules and regulations and the laws and ordinances of the city in relation thereto; to appoint such officers and employees as may be necessary for the execution of its orders, and to define their duties, as the city council may by ordinance permit and to be provided for hereafter by ordinance; to enter into or authorize and require any employee to enter into and examine in the day time all buildings, lots, and places of every description within the city, and to ascertain and report

to it the condition thereof so far as the public health may be affected thereby. The board of health shall have power: To determine, regulate, and order, as to the materials, plans, and mode of construction, alteration, repair, location, removal, cleansing, disinfecting or filling of all sinks, or earth closets, and other descriptions of privies within the city; to regulate and control the public sewers, and the mode of connection of house drainage and plumbing with public sewers, and to compel owners of buildings to connect the same with the public sewers, where a public sewer abuts the estate to be drained or is within one hundred feet thereof; to declare and abate nuisances prejudicial to the public health, and in such manner as may be provided by ordinance, and to adopt such measures and issue such orders for the cleansing or purifying of any place or places, or abate or removal of any nuisance, as it may deem proper or necessary; to provide for and enforce the registration of all marriages, births, and deaths occurring within the city. It shall have charge of all city hospitals and make all necessary rules for the government of the same. The board of health shall have power to take such measures as it may deem effectual to prevent the entrance or spread of any pestilential, contagious, or infectious diseases into the city; to stop, detain, and examine for that purpose any person or persons coming from any place infected or believed to be infected with such disease; to establish, maintain, and regulate pest houses or hospitals for such diseases at some place within the city or not exceeding five miles beyond its bounds; at its discretion to cause any person infected with any such disease to be sent to such pest house or hospitals; to enforce vaccination; to remove from the city or

cause to be destroyed any furniture, wearing apparel, or property of any kind which shall be suspected of being tainted or infected with pestilence, or which shall be likely to pass into such a state as to generate or propagate disease; to require the isolation of all persons and things infected with or exposed to contagious or infectious disease; to prohibit and prevent all intercourse and communication with or use of infected premises, places or things, and to require and if necessary to provide the means for the thorough disinfecting and cleansing of the same before general intercourse therewith shall be allowed.

Sec. 129. The owner, driver, conductor, or person in charge of any stage, railroad car, or public conveyance, which shall enter the city knowingly having on board any person sick of a malignant or pesilential, contagious or infectious disease, unless such person became sick on the way and could not be left, shall be deemed guilty of a misdemeanor; punishable by fine and imprisonment or either. Such owner, driver, conductor, or person in charge, shall within three hours after the arrival of such sick person report in writing the facts, with the name of such person and the locality or house where he was put down, to the health physician; and every neglect to comply with these provisions shall be a misdemeanor, punishable with fine and imprisonment or either. Any person who shall knowingly bring or cause to be brought into the city any person or property of any kind tainted or infected with malignant fever or pestilential or infectious disease shall be deemed guilty of a misdemeanor, and punishable by fine or imprisonment or either.

Sec. 130. Every keeper of any inn, hotel, tavern, or boarding or lodging house in the city, who shall have in his house any sick guest, traveler, or other person, shall report the fact and the name of the person in writing, within six hours after he came to the house or was taken sick therein, to the health physician. Every physician in the city shall report under his hand to the health physician the name and residence or whereabouts and disease of every person whom he shall have sick of any malignant or infectious or pestilential disease within six hours after he shall have visited such patient and determined or suspected the presence of such disease. A violation of either of the provisions of this section or any part of either of them shall be a misdemeanor, punishable by fine and imprisonment or either: Provided, That no fine under the articles of this section shall in any case be less than ten dollars nor more than five hundred dollars; nor shall imprisonment be for a less period than five days nor more than three months.

Sec. 131. The board of health shall appoint a health physician not a member of said board for the city, who shall also be ex officio secretary of the board, whose general duties shall be defined by the board; also such medical staff for the city hospitals as the city council may by ordinance permit, and select all other subordinate officers for the city hospitals as shall be provided by ordinance; their salaries to be fixed in all cases by the city council.

Sec. 132. In order to effect the abatement of nuisances or accumulated filth, the board of health shall have power, whenever in its opinion such nuisance or filth exists and is or is likely to become detrimental

to the public health, after officially so declared by them, to notify in writing through its officers the owner, agent, lessee, or tenants thereof to abate the same, either by filling up, draining, cleansing, purifying, or removing the same as the case may be. If the owner who shall have been served with such notice shall fail within the time indicated in such notice to comply with such order of the board, or fail to show good cause to said board why he can not or ought not to comply with such order, for which purpose he shall be entitled to be heard before said board if he so requests it, he shall be deemd guilty of a misdmeanor and on conviction shall be fined not less than ten dollars nor more than two hundred dollars, with an additional fine of not less than five dollars nor more than fifty dollars imposed for each and every day that the person or persons thus convicted shall after conviction and due notice thereof fail or refuse to abate or use due diligence in the work of abating such nuisance; and if such service can not be made for the reason that the owner, agent, lessee, or tenant of the property upon which the nuisance may exist can not be found in the city, of which fact the return upon the notice of the officer serving the same shall be conclusive evidence, then the board shall cause such notice to be published, in the newspaper doing the city printing, for five consecutive days (Sundays excepted), and if within five days after such service of such notice or after its publication as aforesaid such nuisance shall not be abated, or the order observed by the owner, then the board of health may order the same to be done; the said work to be executed under the supervision of the street superintendent or such other person charged with like city work and as hereinafter directed, and the cost and

manner of execution of the same when fully completed to be ascertained by the city engineer under the direction of the board of health, and the amount thereof shall be assessed as a special tax against the property so improved or upon which such work has been done in the name of the owner thereof, and the collection of said amount shall be enforced in accordance with the ordinances of the city; and on filing with the county clerk of El Paso county a statement by the mayor of such expense shall have a first privileged lien on said property to secure said expenditure and twelve per cent interest thereon. For any such expenditure and interest as aforesaid suit may be instituted and recovery had in the name of the city in any Court having jurisdiction, and the statement so made as aforesaid or a certified copy thereof shall be full and satisfactory evidence of the amount expended in such improvement.

Sec. 133. Whenever it shall come to the knowledge of the board of health that any malignant, infectious, or contagious disease or epidemic is prevalent in the city or will probably become so, the president of the board having made public announcement of such fact, after the announcement the board of health shall have power by order to take all steps and do all things necessary to avoid, suppress or mitigate such disease; and to provide for such emergency it may employ such officers, agents, servants, and assistants as the city council may by resolution or ordinance permit, and may establish temporary hospitals, provide the necessary furniture, medical attendance, and nurses as in the opinion of said board may be necessary and advisable and as may be permitted by ordinance or resolution of the city council. The board shall

have and exercise such extraordinary powers until the epidemic or disease in view of which the said public announcement was made is no longer imminent or prevalent, whereupon the said powers shall cease.

Sec. 134. Said board shall keep a record of its proceedings; shall file all petitions, documents, and papers belonging to its office, and shall keep a correct account in full of all its receipts and expenditures, and shall make rules and regulations for the government of the board and for the transaction of its business. Copies of records, documents, rules, and regulations, when authenticated by its secretary, shall be presumptive evidence in any Court of justice of the facts therein contained: Provided, such rules and regulations are not inconsistent with the charter or ordinances. The archives and all papers pertaining to the sanitary department shall at all times be open to inspection of the mayor or a committee of the city council, and monthly or quarterly reports of all the operations, receipts, and expenditures shall be made by the board of health to the city council.

Sec. 135. The powers, authority, and jurisdiction of the board of health shall be and the same are hereby extended over and throughout the district of country outside the city of El Paso to the extent of five miles from its corporate limits within the state of Texas. When the annual appropriation of funds for current expenses of the city is made by the city council, as provided in this act, such an amount as may be necessary for sanitary purposes, together with such fines and penalties as may accrue under the provisions of this act, shall be set aside as a special fund, to be known as the sanitary fund, in the hands of the

city treasurer, and shall only be subject to be drawn out on requisition of the board of health for sanitary purposes; Provided, That all claims and accounts of the said board of health shall be duly audited in the same manner as other claims and accounts against the city.

Streets and Alleys.

Sec. 136. The city council shall have power to establish by ordinance the grade of any street, alley, avenue, or lane within the city, and when the grade of such street, alley, avenue, or lane shall have been so established, the grading completed and accepted by the city council, such grade shall not be changed except by a vote of two-thirds of the city council and not then until just compensation shall have been made by the city council to the owners of property which may be damaged by said change of grade; and if the amount of such compensation can not be agreed upon by the city council and the owner or owners of such property, then the city council shall proceed to have the damages assessed and determined in the manner provided in section 148 of this act, and the commissioners appointed to assess the damages shall take into consideration the benefit, if any, to such property by the proposed change of grade.

Sec. 137. The city council shall have power to extend, vacate, open, widen, grade, pave and macadamize, or otherwise improve and keep in repair in any manner that they may deem proper any street, sidewalk, alley, avenue, or lane within the limits of the city, and to defray the cost and expense of such improvements or any of them. The council shall have

power to levy and collect special taxes upon the lots and pieces of ground adjacent to or abutting upon the street, sidewalk, alley, avenue, or lane thus opened, widened, extended, or improved or to be improved as aforesaid.

Sec. 138. Such taxes shall be levied on all the lots and pieces of ground to the center of the block fronting on or adjacent to the improvement made and extended along the street or streets, sidewalks, alleys, avenues, or lanes for the distance improved or extended as aforesaid.

Sec. 139. The council shall also have power to provide for keeping clean and free from all obstructions and accumulations and may provide for the assessment and collection of taxes on unoccupied real estate and for the sale and conveyance thereof to pay the expenses of keeping the sidewalks adjacent to such real estate clean and free from obstructions and accumulations as herein provided.

Sec. 140. When the city council shall deem it necessary to open, widen, extend, pave, macadamize, bridge, curb, gutter, or otherwise improve any street, alley, avenue or lane, or to construct any sidewalks or crossings either where a sidewalk is already built or where it may be declared necessary to construct a sidewalk with or without crossings within the limits of the city, for which a special tax is to be levied as herein provided, the council shall by resolution declare such work or improvement necessary to be done, and such resolution shall be published once each week for four consecutive weeks in a newspaper doing the official printing for the city, and if a ma-

jority of the persons owning such property reside in the city (except persons claiming an interest in such property by reason of tax titles), and whose property is liable to be taxed for such work or improvement shall not within twenty days thereafter file with the city clerk their protest against such improvements, then the city council shall have power to cause such improvement to be made and to contract therefor and to levy and collect the taxes as herein provided: Provided, That no resolution for the same improvement shall again be passed by the council within six months after such protest shall have been filed: And provided further, That when the city council shall have declared it necessary by resolution as herein provided to construct a sidewalk and crossings along any street, alley, avenue, or lane in the city for which a special tax is to be levied as herein provided, and no sufficient protest against said sidewalks and crossings as herein provided shall have been filed with the city clerk, the city council shall cause the city engineer to advertise for proposals for doing said work, and at any time prior to the contract being signed for doing said work the owner or agent for any portion of the property liable to be taxed for said improvements may construct the sidewalks, under the directions of the city engineer and to his entire satisfaction and approval, along or in front of such portion of property liable to be taxed as aforesaid; and it shall be the duty of the city engineer in calculating the amount of tax to be levied for said improvement to credit the statement which he files with the city clerk showing the amount of tax due upon each block, lot, or pieces of ground as hereinafter provided, with the amount of sidewalk so constructed by said owner or agent as aforesaid, but

the construction of said sidewalk by said owner or agent as aforesaid, shall not exempt such lot or lots or pieces of ground from being liable for their proportion of the tax so levied for the construction of the cross walks and intersections across the cross streets between the points named in the original resolution declaring it necessary to construct said sidewalk and crossings.

Sec. 141. Such taxes shall be due and may be collected as the improvements are completed in front of or along or upon any block or piece of ground, or at the time the improvement is completed, according as shall be provided in the ordinance levying the tax. Such tax, if not paid within thirty days after becoming due, shall have added thereto a penalty of ten per cent and shall bear interest from the day of sale at the rate of twenty-five per cent per annum, to be computed on the tax, penalty, and costs of sale.

Sec. 142. The costs and expenses of grading, filling, paving, macadamizing, culverting, curbing, and guttering or otherwise improving streets, sidewalks, alleys, avenues, or lanes, at their intersections, may be included in the special tax levied for the improvement of any one street, sidewalk, alley, avenue, or lane as may be deemed just by the council.

Sec. 143. When the special tax is levied it shall be the duty of the engineer of the city to calculate the amount of tax on every block or piece of ground and file a statement thereof with the city clerk, who shall as soon as the tax is due on any block or piece of ground issue a certificate describing it by its number and block and stating the amount of tax due thereon

and the name of the person entitled to the same and the purposes for which said tax was levied; and such certificate so given shall be the tax warrant of the contractor, and shall be by the city clerk placed in the hands of the city treasurer, who shall give notice through the official paper of the city, at the cost of the contractor, when the penalty will accrue, and the treasurer shall keep a record of all such warrants and enter in the margin of such record all amounts paid and by whom paid.

Sec. 144. It shall be sufficient in any case to describe the lot or piece of ground as the same is platted and recorded, although the same may belong to several persons; but in case any lot or piece of ground may belong to different persons the owner of any part thereof may pay his proportion of the tax on such lot or piece of ground and his proper share may be determined by the city treasurer.

Sec. 145. The city council shall have power to provide for the sale and conveyance of any lot or piece of ground for nonpayment of such special taxes and the deeds given to convey the same may be recorded in the office of the register of deeds as other conveyances; the conveyance shall be to the person owning the certificate of sale at the time such conveyance is given: Provided, That any lot or piece of ground may be redeemed within two years after the day of sale or at any time thereafter until the tax deed is issued, by paying to the city treasurer the tax, penalty, costs, and interest at the rate of twenty-five per cent per annum. Lots of land belonging to minors or any interest they may have in any lands sold for special taxes may be redeemed in the same manner

at any time before such minor becomes of age and during one year thereafter.

Sec. 146. When any improvement mentioned in this act is completed according to contract, it shall be the duty of the city engineer to inspect the same carefully, and if the improvement is found to be properly done the engineer shall accept the same and forthwith report the acceptance of the same to the city council, which may confirm or reject such acceptance. When the ordinance levying the tax makes the same due as the improvement is completed in front of or along any block or piece of ground, then the engineer may accept the same in sections from time to time if found to be done according to contract, always reporting his acceptance to the city council for confirmation or rejection.

Sec. 147. Special taxes shall be a lien on the lots and pieces of ground subject to the same from the time the amount thereof shall have been ascertained, and in case any error or irregularity should occur in levying or collecting any such special tax proceedings may be taken anew so as to obviate any such error or irregularity.

Sec. 148. Whenever the city council shall deem it necessary to take any private property in order to open, change, or widen any public street, avenue, or alley, or for the construction of water mains or sewers or for any other municipal purpose within or without the limits of the city, such property may be taken for such purpose by making just compensation to the owner thereof. If the amount of such compensation can not be agreed upon by the city council and the

owner or owners of such property it shall be the duty of the city council to cause to be stated in writing the real estate or property sought to be taken, the name of the owner thereof, and his residence if known and file such statement with the county Judge of El Paso County. Upon the filing of such statement it shall be the duty of said Judge in term time or vacation to appoint three disinterested freeholders and qualified voters of the county as special commissioners to assess the damages to accrue to the owner by reason of such proposed condemnation. The commissioners so appointed shall in their proceedings be governed and controlled by the laws in force in reference to the condemnation of right of way for railroad companies and the assessment of damages therefor, the city occupying the position of the railroad company; and all laws in reference to applications for the condemnation of right of way for railroad companies, including the measure of damages, the right of appeal and the like, shall apply to an application by the city under this act for the condemnation of property for the purpose of opening, changing, or widening streets, avenues, or alleys, or for the construction of water mains or sewers, or for any other municipal purpose, the city to occupy the position of the railroad company.

Miscellaneous Provisions

Sec. 149. Whenever in the opinion of the city council any building, fence, shed, awning, or any erection of any kind or any part thereof is liable to fall down and endanger persons or property, the council may order any owner or agent of the same, or any owner or occupant of the premises on which such building,

shed, awning, or other erection stands or to which it is attached, to take down and remove the same or any part thereof within such time as the city council may direct, and to punish by fine and imprisonment or either any neglect, failure, or refusal to comply therewith. The city council shall in addition have the power to remove the same at the expense of the [illegible] of the property or premises and assess the expenses on the land on which it stood or to which it was attached, and shall by ordinance provide for such assessment, the mode and manner of giving notice, and the means of recovering such expenses.

Sec. 150. Writs issued by the recorder of the city for offenses against the laws may be executed and the accused persons arrested by the chief of police or any police officer or by the sheriff or any constable of El Paso County anywhere in El Paso County.

Sec. 151. Whenever any person shall have been required by the recorder to give peace bond or a bond for good behavior or any similar bond under this act, and shall have complied with such orders and afterwards been guilty of a violation or infraction of such bond, and the same is proved or established to the satisfaction of the recorder in any trial or complaint, such party so offending may be fined in the sum of two hundred dollars and imprisonment for two months and the city in its corporate name may sue in any Court having jurisdiction for the recovery of the penalty of such bond.

Sec. 152 In all cases where by any provision of this act or by ordinance passed in pursuance thereof

a person is required to obtain a license for any calling, occupation, business, or vocation, and has on complaint before the recorder been adjudged guilty of violation of any rule, regulation, or city ordinance of the city council in relation thereto, the recorder in addition to fine and imprisonment or either may suspend or revoke the license so granted.

Sec. 153. The city council shall as soon as may be after the commencement of each municipal year contract, as it may by ordinance or resolution determine, with a public newspaper of the city as the official paper thereof, and to continue as such until another is elected, and shall cause to be published therein all ordinances, notes, and other matters required by this act or by the ordinances of the city to be published.

Sec. 154. The city council shall at least ten days before the expiration of each municipal year cause to be published in a city newspaper a correct and full statement of the receipts and expenditures from the date of the last annual report, together with the sources from which the funds were derived, and showing for what purpose disbursed and the condition of the treasury, together with such information as may be necessary to a full understanding of the financial condition of the city.

Sec. 155. Every ordinance imposing any penalty, fine, imprisonment, or forfeiture for violation of its provisions, shall after the passage thereof be published in every issue of the official paper for ten days, and the proof of such publication by the printer or publisher of such newspaper, taken before any of-

ficer authorized to administer oaths and filed with the city clerk, or any other competent proof of such publication, shall be conclusive evidence in all Courts of the publication and promulgation of such ordinances. Ordinances passed by the city council and requiring publication shall take effect and be in force from and after the publication thereof unless it be therein otherwise expressly provided: Provided, That all ordinances and resolutions of the city council appearing on the minutes thereof shall be presumed to have been published and promulgated as herein required unless the contrary shall be shown.

Sec. 156. All ordinances of the city where printed and published by authority of the city council shall be admitted and received in all Courts and places without further proof.

Sec. 157. The style of all ordinances shall be substantially, "Be it ordained by the city council of the city of El Paso," but it may be omitted when published in the form of a book or pamphlet.

Sec. 158. All ordinances, regulations, or resolutions in force in the city of El Paso and not in conflict with this act shall remain in force under this act until altered, amended, or repealed by the city council; and all officers of the city in office at the time of the taking effect of this act shall remain in office till the election or appointment and qualification of their successors, as herein provided.

Sec. 159. All fines, forfeitures, and penalties for breach or violation of this act, or of any regulation, order, or ordinance of the city council, shall when

collected be paid into the city treasury for the use and benefit of the city.

Sec. 160. Resignation by any officer authorized to be elected or appointed by this act shall be made to the city council in writing, subject to its approval and acceptance: Provided, That nothing in this article shall apply to appointments by the mayor. Any appointee by the mayor wishing to resign shall present his resignation to the mayor in writing for his action.

Sec. 161. The city council shall have power to remove any officer for incompetency, for corruption, misconduct, or malfeasance in office after he shall have been given due notice and an opportunity to be heard in his defense. In addition to the foregoing power of removal, the city council shall have power at any time to remove any officer of the corporation elected by it by resolution declaratory of its want of confidence in such officer, provided that two-thirds of all the aldermen elected vote in favor of such resolution.

Sec. 162. Whenever any person shall be removed from any office, or the term for which he was elected or appointed has expired, or he has resigned or has ceased to act in his official capacity, he shall deliver over to his successor all books, papers, and effects in any way appertaining to his office. Every person violating this provision shall be guilty of a misdemeanor and shall be deemed an offender within the meaning of any law of the state punishing such offenses, and in addition thereto he shall on conviction before the recorder be fined in a sum not exceeding

five hundred dollars and imprisonment for any time not exceeding six months or either. Any officer who shall have been intrusted with the collection or custody of funds belonging to the city and who shall be in default to the city, besides being liable to a criminal prosecution and a civil action for debt, shall thereafter be incapable of holding any office under the city until the amount of his defalcation shall have been fully paid to the city with twelve per cent interest.

Sec. 163. No member of the city council shall hold any other employment or office under the city government while he is a member of the council unless herein otherwise provided, and no member of the city council or any officer of the corporation shall be directly or indirectly interested in any work, business, or contract, the expense, price, or consideration of which is paid from the city treasury or by an assessment levied by ordinance or resolution of the city council, nor be the surety of any person having a contract, work, or business with the city for the performance of which security may be required, nor be the surety on the official bond of any officer of the city.

Sec. 164. Each alderman shall be fined five dollars for each meeting of the city council which he fails to attend unless on account of his own sickness or that of his family. Any member of the city council remaining absent for three consecutive meetings of the council unless prevented by sickness, without first having obtained leave of absence at a regular meeting, shall be deemed to have vacated his office, and the mayor shall proceed to fill the vacancy in accordance with the charter.

Sec. 165. The city council shall have power to prescribe the duties of all officers and persons appointed by it or elected to any office or place whatever, subject to the provisions of this act, and to remit in whole or in part on such conditions as may be deemed proper, by a vote of two-thirds of the members present, any fine or penalty belonging to the city which may be imposed or incurred under this act or under any ordinance or resolution in pursuance thereof.

Sec. 166. The city council shall, on the first day of January of each and every year ending in an odd number or as soon thereafter as practicable fix the salary of the mayor to be elected at the next regular election, and shall at the same time establish the compensation or salary to be paid to the officers elected or appointed by the city council, and the compensation or salary so established shall not be changed during the term for which said officers shall be elected or appointed.

Sec. 167. It shall not be necessary in any action, suit, or proceeding in which the city shall be a party for any bond, undertaking, or security to be executed in behalf of the city; but all such actions, suits, and proceedings shall be conducted in the same manner as if such bond, undertaking, or security had been given, and for all the purposes of such actions, suits, and proceedings the city shall be liable in the same manner and to the same extent as if the bond, undertaking, or security required in ordinary cases had been duly given and executed.

Sec. 168. The cemetery lots which have been and may hereafter be laid out and sold for the city for

private places of burial shall with their appurtenances be forever exempt from taxes, executions, attachments, or forced sales.

Sec. 169. All rights, actions, fines, penalties, and forfeitures in suits or otherwise which have accrued under the laws heretofore in force shall be vested in and prosecuted by the corporation hereby created; and no suit pending shall be affected by the passage and acceptance of this act, but the same shall be prosecuted or defended, as the case may be, by the corporation hereby created.

Sec. 170. All property, real, personal, or mixed, belonging to the city of El Paso is hereby vested in the corporation created by this act.

Sec. 171. No indebtedness of any character whatever hereafter incurred by said corporation shall draw a higher rate of interest than ten per cent per annum.

Sec. 172. The city council shall have power to establish free libraries in the city, to adopt rules and regulations for the proper management thereof, and to appropriate such part of the revenues of the city for the management and increase thereof as the city council shall by ordinance determine.

Sec. 173. The city council shall have power to take census of the city whenever and as often as it may be necessary.

Sec. 174. This act shall be deemed a public act and the Courts shall take judicial knowledge thereof at all times and in all proceedings.

Sec. 175. Whereas the city of El Paso now has more than ten thousand inhabitants, and the present charter thereof is wholly inadequate, and it is desirable that the municipal elections of said city should be held at the same time as those of the other cities; therefore an emergency exists and an imperative public necessity demands the suspension of the constitutional rule which requires a bill to be read on three several days, and that this act take effect and be in force from and after its passage.

Sec. 176. An act entitled "An Act to incorporate the city of El Paso", approved May 17, 1873, is hereby repealed.

(Note.—The foregoing act originated in the house, and passed the same by a vote of 91 yeas, no nays; and passed the senate by a vote of 22 yeas, no nays.)

Approved, March 2, 1889.

(At this point an instrument was marked for identification as Defendant's Exhibit No. 65 and was handed to opposing counsel for examination.)

Mr. Guinn:
At this time I would like to offer Defendant's Exhibit 65, the Irrigation Act of 1889.

Mr. Edwards:
No objection.

Mr. Guinn:
Approved March 19, 1889, and I would like to read part of that Act.

The Court:
All right.

Defendant's Exhibit No. 65, having been received in evidence by the Court, reads in words and figures as follows:

"D-65".

Irrigation.

Chap. 88.—(S.H.B. No. 298) An Act to encourage irrigation, and to provide for the acquisition of the right to the use of water, and for the construction and maintenance of canals, ditches, flumes, reservoirs, and walls for irrigation, and for mining, milling and stockraising in the arid districts of Texas.

Secton 1. Be it enacted by the Legislature of the State of Texas: That the unappropriated waters of every river or natural stream within the arid portions of the state of Texas, in which, by reason of the insufficient rainfall, irrigation is necessary for agricultural purposes, may be diverted from its natural channel for irrigation, domestic, and other beneficial uses: Provided, That said water shall not be diverted so as to deprive any person who claims, owns, or holds a possessory right or title to any land lying along the bank or margin of any river or natural stream of the use of the water thereof for his own domestic use.

Sec. 2. That the unappropriated waters of every river of natural stream within the arid portions of

the state, as described in the preceding section of this act, are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes as hereinafter provided.

Sec. 3. The appropriation must be for the purposes named in this act, and when the appropriator, or his successor in interest, ceases to use it for such purpose the right ceases.

Sec. 4. As between appropriators, the one first in time is the one first in right to such quantity of the water only as is reasonably sufficient and necessary to irrigate the land susceptible of irrigation on either side of ditch or canal.

Sec. 5. Every person, corporation, or association of persons which have constructed or may hereafter construct any ditch, canal, or reservoir, for the purposes named in this act, and taking water from any natural stream, shall, within ninety days after this act goes into effect, or within ninety days after the commencement of such construction, file and cause to be recorded in the office of the county clerk of the county where the head gate of such ditch or canal may be situated, or to which said county may be attached for judicial purposes, in a well bound book to be kept by said clerk for that purpose, a sworn statement in writing, showing the name of such ditch or canal, the point at which the head gate thereof is situated, the size of the ditch or canal in width and depth, and the carrying capacity thereof in cubic feet per second of time, the name of said stream from which said water is taken, the time when the work was commenced, and the name of the owners or

owner thereof, together with a map showing the route of said ditch or canal.

Sec. 6. Within ninety days next after the filing of said statement, the party claiming the right to appropriate the water shall begin the actual construction of the proposed ditch, canal, or reservoir, and shall prosecute the work thereon diligently and continuously to completion.

Sec. 7. "Completion," as used in the preceding section, is hereby defined to be the conducting of the water in the main canal to the place of intended use.

Sec. 8. By compliance with the preceding provisions of this act the claimant's right to the use of the water relates back to the time when the work of excavation or construction was commenced on said proposed ditch, canal, or reservoir: Provided: That a failure to file said statement shall in no wise work a forfeiture of such heretofore acquired rights, nor prevent such claimants of such heretofore acquired rights from establishing such rights in the Courts.

Sec. 9. When any person, corporation, or association of persons, by compliance with the preceding provisions of this act, shall become entitled to the use of the waters in any river or stream, it shall thereafter be unlawful for any other person, corporation, or association of persons, except for domestic use by any one entitled thereto, to so divert the flow of water in said river or stream in such manner and to the extent of depriving said person, corporation, or association of persons in priority of the use of the water to which they may be so entitled.

Sec. 10. Corporations may be formed and chartered under the provisions of this act and of the general incorporation laws of the state of Texas, for the purpose of constructing, maintaining, and operating canals, ditches, flumes, feeders, laterals, reservoirs, and wells and of conducting, transferring, and furnishing water to all persons entitled to the same, for irrigation and domestic uses, and for the purpose of building storage reservoirs for the collection and storage of water for the uses before mentioned, and for mining, milling, and stock-raising. All persons who own or hold a possessory right or title to land adjoining or contiguous to any canal, ditch, flume, or lateral, constructed and maintained under the provisions of this act, and who shall have secured a right to the use of water in said canal, ditch, flume, or lateral, shall be entitled to be supplied from such canal, ditch, flume, or lateral with water for the irrigation of such land and domestic uses: Provided, The party so entitled shall first make available his said land for agricultural or grazing purposes, and shall provide cisterns, wells, or storage reservoirs for water for domestic purposes.

Sec. 11. All corporations and associations formed for the purposes of irrigation as provided in this act, are hereby granted the right of way, not to exceed one hundred feet in width, over all public, university, school, and asylum lands of the state, with the use of the rock, gravel, and timber on the right of way, for construction purposes, and may obtain the right of way over private lands by contract. Any such corporation may also obtain the right of way over private lands by condemnation by causing the damages for any private property appropriated by such corpora-

tion or associations to be assessed and paid for as provided in cases of railroads.

Sec. 12. All surplus water not used or disposed of as provided for in the preceding sections of this act, shall be conducted back to the stream from which it was taken. And all water sold or disposed of may be measured in inches, feet, or fractional portion of the whole supply, or distributed by the hour or acre system. But any person, corporation, or association of persons shall furnish water in the way and manner named in the contract or certificate issued to the purchasers of said water so long as water remains unsold in the ditch: Provided, That the commissioner of agriculture, insurance, statistics, and history, shall make a report to the legislature at its next regular session, and at each regular session thereafter, as to the cost and expense attending the construction and maintenance of canals, ditches, flumes, feeders, and wells for irrigation in various parts of the state, and accompany the same with a statement of the charges made for the use of water by canal, ditch, and well companies, and the legislature shall at such times as it deems proper, either by direct legislation or by the creation of a commissioner or water inspector or inspectors with full delegated power, control and regulate the quantity of water which may be diverted by any water company or individual, when and in the manner in which it may be diverted, and may establish and enforce all such reasonable rules and regulations necessary and proper governing and controlling such corporations and water construction companies and persons operating under the provisions of this act, and may also control, regulate, change and fix the charges for the use of water made by such ditch, canal, and well companies.

Sec. 13. All said persons, corporations, and associations shall have the right to run along or across all roads and highways necessary in the construction of bridges for the accommodation of the public, and shall not affect or impair the usefulness of condition of said road or highway.

Sec. 14. Any person who shall wilfully or through gross negligence injure any irrigating canal or its appurtenances, wells, or reservoirs, or who shall waste the water thereof, or shall take the water therefrom without authority, shall be deemed guilty of a misdemeanor, and for each offense shall be liable to a fine not exceeding five hundred dollars.

Sec. 15. Any corporation created and organized under the provisions of the general laws of this state or the provisions of this act for the purpose of irrigation, shall have the power to acquire lands by voluntary donation or purchase or in payment of stock or water rights, and to hold and dispose of all such lands and other property, and to borrow money for the construction, maintenance, and operation of its canals, ditches, flumes, feeders, reservoirs, and wells, and may issue bonds and mortgage its corporate property and franchises to secure the payment of any debt contracted for the same: Provided, All lands acquired by said corporation, except such as are used for the construction, maintenance, and operation of said canals, ditches, laterals, feeders, reservoirs, and wells shall be alienated within twenty years from the date of acquiring said lands or be subject to judicial forfeiture.

Sec. 16. All laws and parts of laws in conflict with the provisions of this act are hereby repealed.

Sec. 17. Whereas it is necessary that irrigating canals should be built at once to afford water for irrigational purposes for the present year; therefore an emergency exists, and an imperative public necessity demands the suspension of the constitutional rule which requires a bill to be read on three several days, and that this act take effect and be in force from and after its passage.

(Note.—The foregoing act originated in the house, and passed the same by a vote of 69 yeas, 6 nays; and passed the senate by a vote of 21 yeas, no nays.)

Approved, March 19, 1889.

(At this point four instruments were marked for identification as Defendant's Exhibits 66, 67, 68 and 69.)

Mr. Guinn:

I would like to offer Defendant's Exhibit No. 66, which consists of an Agreement between the City of El Paso and The El Paso Water Company made on October 28, 1889.

Mr. Edwards:

No objection.

Defendant's Exhibit No. 66, which was read by Mr. Guinn, was received in evidence by the Court, and same reads in words and figures as follows:

"D-66"

Regular Meeting, Friday, Oct. 25, 1889.

Recorded in Minute Book F, Page 68.

Alderman Johnson offered the following resolution which was read and adopted.

Resolved, by City Council of the City of El Paso: That the City Clerk be and is hereby authorized and instructed to invite proposals for boring one or more Artesian Wells for the use of the City of El Paso; the number of wells and location of same to be hereafter determined by the City Council; the well or wells to reach a depth at which a sufficient supply of water shall be obtained. the flow to be hereafter determined by the Council.

Agreement Passed October 28, 1889 and recorded in Book F Page 94.

Agreement Between the City of El Paso and the El Paso Water Company.

The State of Texas,
County of El Paso.

This Indenture, made this, the 28th day of October, A. D. 1889, between the City of El Paso, a municipal corporation, duly incorporated by the State of Texas, acting herein by its Mayor, Richard Caples, who is specially authorized by a resolution of the City Council to sign these presents; and the El Paso Water Company, a corporation duly incorporated under the laws of the State of Kansas, and whose principal of-

fice is in El Paso, El Paso County, Texas, acting herein by Sylvester Watts, who is specially authorized by a resolution of its Board of Directors to sign these presents,

Witnesseth: That the City of El Paso, for and in consideration of the promises, agreements and covenant by the said El Paso Water Company in the payment of money and the performance of work and labor as hereinafter stated to be kept and performed, does sell to the said El Paso Water C mpany, and does license it to use the surplus water running in the El Paso Acequia (sometimes called the Flort Bliss and Magoffinville Acequia) over and above what the ditch below the pumping house will carry, for the period of one year after the signing and execution of these presents, and does also release, surrender and cancel to said Water Company any debt, claim or demand due the said City of El Paso from the said Water Company on account of the taking and using heretofore by said Water Company, of water from the said Acequia, without the consent of and license from said City. The license herein, to take the surplus water in said Acequia, is given upon the express condition that it must not interfere with or diminish the full and usual flow of water in that portion of the ditch below the pumping station of said water company, whether the carrying capacity of the ditch remains as in former years, or should be so enlarged as to require all the water that passes through the inlet, and in all cases of doubt as to whether there is any surplus of water in the Acequia at the pumping station, over and above the carrying capacity of the ditch below, the City Council, or in the intervene between its sessions, the Mayor of the City of El Paso,

shall decide, and may in such cases require the said Water Company to cease pumping from said Acequia.

In consideration Thereof, the said El Paso Water Company does covenant and agree with the said City of El Paso, that it will do, pay and perform as follows:

First: During the life of this agreement, to wit, during the period of one year from the signing of the presents, that it will pay to the City of El Paso the sum of one dollar ($1.00) for each and every calendar month.

Second: It will pay to the City of El Paso whatever money the said City has paid S. N. Wilson for flushing sewer tanks under his contract with the city; it being understood that the city is not thereby released from its contract with the said Water Company for flushing the sewer tanks at Sixty Dollars ($60.00) per month during the same period.

Third: It will furnish the City of El Paso all water for sprinkling purposes at the rate of twenty cents ($0.20) per thousand gallons, and it will furnish and locate at such points along the line of the Company's mains, and on the same side of the street, as the City may designate, the necessary sprinkling hydrants or apparatus at a cost of $20.00 to be paid by said city, or $25.00 if located on the opposite side of the street.

Fourth: It will maintain and keep, at its own expense, at its pump house, a telephone and connections with the General Telephone service in the City

of El Paso, for the use of the public to transmit messages concerning the condition of, and other matters in connection with said acequia.

Fifth: It will employ, maintain and keep, at its own expense, a watchman or other employe whose special duty it shall be to attend to the Head Gate, Flood Gate, and Cut-off-Gate, and to regulate the same as the needs of the City may require, and especially is it made the duty of said employe to shut the water out of the Acequia when any breaks may occur in the City

Sixth: It will do and perform, or cause to be done and performed the following work and labor, and furnish all necessary material therefor, all to be at its own expense, which work is to be fully completed and ended by the First day of February, A. D. 1890; Floods, the act of God, and other circumstances over which it has no control, excepted, under penalty, if not done by said last named date, the City of El Paso may cause said work to be done at the expense of said Water Company, which expense, if so incurred by said City, the said Water Company hereby agrees to re-pay.

First: It will widen the said Acequia to at least five feet at the bottom, for the entire distance from the head of the ditch to the pumping station, without inerfering with the existing grade.

Second: It will furnish and place a new Head-Gate, and restore and construct masonry where necessary at the inlet.

Third: It will furnish and place a new flood-gate at a convenient place near and below its pumping station and in connection therewith, and immediately below said flood gate it will furnish and place a cut-off gate to effectually stop the flow of water below same.

Fourth: It will maintain and keep the said Acequia in good order and repair, during the life of this agreement, between the Head-gate of the Acequia and a point opposite the Old Santa Fe Pumping Station.

In Witness whereof the City of El Paso, acting herein by her Mayor, as aforesaid, and the said El Paso Water Company, acting herein by her president, and the signatures of both attested by the seals of the respective corporations, do sign the same, this the 28th day of October, A. D. 1889.

(Signed) CITY OF EL PASO,
By RICHARD CAPLES,
(Seal) Mayor.

Attest:
(Signed) G. E. BOVEE,
City Clerk.

(Signed) EL PASO WATER CO.,
By SYLVESTER WATTS.

(Signed) EL PASO WATER CO.,
By J. W. PARKER,
President.

Attest:
(Signed) N. A. LAWTON,
Secretary.

11 15 54.

A true and correct copy, I do hereby certify:
(S.) J. M. HERRERA,
City Clerk.

Mr. Guinn:
I now offer Defendant's Exhibit No. 67, being an Ordinance of June 28, 1890, relating to the public acequia in the City of El Paso.

Mr. Edwards:
No objection.

Defendant's Exhibit No. 67, which was read by Mr. Guinn, was received in evidence by the Court, and reads in words and figures as follows;

"D-67".

Ordinance passed June 28, 1890 and recorded in Book F Page 238.

No., 27.

An Ordinance Relating to the Public Acequia in the City of El Paso, the Use of the Waters from said Acequia, the Prices to be Paid Therefor, Etc., Etc..

Be It Ordained by the City Council of the City of El Paso:

Section I. That the office of acequia Commissioner be, and the same is hereby created.

Section II. That the City Council may, at such time as it may deem advised, appoint an Acequia Commissioner who shall hold his office at the will of the City Council; and the said Acequia Commissioner shall receive such salary, or compensation, as the City Council may prescribe at the time of his appointment.

Section III. It shall be the duty of said Acequia Commissioner, or assessor, and Collector, to make complaints against all persons who use the water of the acequia in violation of the provisions of this ordinance.

Section IV. That the following annual tax, or rates, are hereby imposed upon, and shall be collected from the consumer of water of said acequia, viz:

For each lot o fland, 26 X 120 Feet, (4 or less lots to one person)	$1.50
For each lot of land, 26 X 120 Ft. (5 to 10 lots to one person)	$1.25
For each lot of land, 26 X 120 (11 to 20 lots to one person)	$1.00
Lots of greater or less square feet, shall be paid for in proportion	$
Gardens per acre	5.00
Agricultural purposes, per acre	2.00
Domestic purposes, for family of not more than five	1.00
Domestic purposes, for family of over five	2.00
For brick making, per thousand	.05
Laying bricks in walls, per thousand	.02½
For making adobes, common size, per thousand	.25
For laying adobes in walls, per thousand	.15

For watering horses, cattle and asses, per head ..	.50
For watering sheep or goats, per head	.10
For all other purposes, per thousand gallons, (Amount to be estimated by the acequia commissioner, or the assessor and collector ..	.25

Provided that the City Assessor and Collector may, at any time, with the consent of the Acequia Committee make special rates for the use of said water per thousand gallons, for purposes, other than those specifically designated herein.

Section V. That the Acequia Commissioner shall have general charge and control of said public acequia and it is made the duty of said Acequia Commissioner, or the City Assessor and Collector, to prosecute all persons using the waters of the acequia without first paying therefor, or without first complying with, or who shall in any manner violate any of the provisions of this ordinance.

Section VI. That it is hereby made the duty of the City Assessor and Collector, (and for this purpose he is hereby authorized) to collect all money imposed as a tax or rate upon the consumers of said water; and upon receiving said money, the said assessor and collector shall execute and deliver to the consumer so paying, a receipt therefor, and said money, so received, shall be, at once paid over to the City Treasurer, by him to be applied to the credit of the Acequia fund: and it is hereby made the duty of said Assessor and collector to keep a receipt book, which shall be the property of the City, and which shall contain a duplicate of each receipt delivered to the consumers of the water of the said acequia.

Section VII. That it shall be unlawful for any person to take any water from said acequia without first having paid the tax, or rate, herein imposed; and any person who shall, in any manner use, take from, or consume any water from said acequia, without first having paid such tax, or rate, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined any sum not less than one dollar, nor more than fifty dollars.

Section VIII. That it shall be unlawful for any person to cut said aeequia for any purpose whatever, without first having obtained the permission of the City Assessor and Collector, or Acequia Commissioner; and any person who shall cut said acequia, without having obtained said permission shall be deemed guilty of a misdemeanor; and upon conviction thereof, shall be fined in any sum not less than one, nor more than fifty dollars.

Section IX. That it shall be unlawful for any person to place in said acequia any flood gate, or any obstruction whatever; or to place over said acequia any structure or crossing without first having obtained the permission of the City Assessor and Collector, or Acequia Commissioner; and any person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one, nor more than fifty dollars.

Section X. That all ordinances in conflict with this ordinance, be, and the same are hereby repealed, and this ordinance shall take effect from and after its passage, approval and publication.

Approved June 28th, 1890.
(S.) RICHARD CAPLES,
Mayor.

Attest:
(S) G. E. BOVEE,
City Clerk.

(Published in the El Paso Daily Times (Official Paper) ten days, commencing July 9th, 1890.)

11/15 54.

A true and correct copy, I do hereby certify:
(S.) J. M. HERRERA,
City Clerk.

Mr. Guinn:
If I may, I would like to call the County Clerk at this time.

RAYMOND L. TELLES, JR., a witness for the Defendant, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Guinn:
Q. Will you please state your name?
A. Raymond L. Telles, Jr.
Q. Where do you live, Mr. Telles?
A. El Paso, Texas.
Q. What is your business?
A. I am County Clerk of El Paso County, Texas.
Q. How long have you so held that position?

A. Approximately six years.

Q. As County Clerk did I ask you to bring certain instruments that were there in your office as County Clerk?

A. Yes, sir.

Q. You have them there with you?

A. Yes, sir.

Q. I want to have them identified, if I may. You have handed me five instruments?

A. That is correct.

Mr. Guinn:

I would like to have them marked and identified.

(At this point five instruments were marked for identification as Defendant's Exhibits 70, 71, 72, 73 and 74.)

Mr. Guinn:

Your Honor, I do not wish to read these instruments. I wish to offer them in evidence. They are regulations by cities or towns along the river regarding the distribution and the management of the water of the Rio Grande. The first one here is in Spanish, and—

Mr. Edwards:

If the Court please, I don't see the relevancy of some instrument relating to some other town down the river.

Mr. Guinn:

It falls within this Water Improvement District and covers water in the Rio Grande. In fact, the town is Socorro, which is just below the City here. It covers the town of Ysleta, which is near the City.

Mr. Edwards:

None within the present limits of the City of El Paso.

Mr. Guinn:

It is relating to the taking of water for domestic use and control of water in the same river by these little towns, and these are the regulations they set up for the use of that water for domestic purposes.

Mr. Edwards:

We object to anything outside the city limits of El Paso.

Mr. Guinn:

It is in this District.

Mr. Edwards:

That hasn't got anything to do with the City of El Paso.

Mr. Guinn:

They will support the theory of the Defendant in this case that under the laws of this State, and we think that the laws that have been offered and the facts before this Court, that the State did grant to hese communites, cities, and towns, even before they were incorporated, the right to control this water and to regulate it and to use it for these purposes, and this is evidence of that fact, which the Court will recall we stated in our brief the position we take, we don't think we are limited merely to El Paso to show that this is on that same river, it is in the same Water Improvement District.

Mr. Edwards:
Downstream from El Paso.

Mr. Guinn:
But it shows what use was made of the water.

The Court:
You don't imply, of course, that these are regulations that are in force now or have been for years and years and years?

Mr. Guinn:
No, sir, but merely whether or not they tend to support the fact of an established right so far as the right to take water from the river for domestic use is concerned.

Mr. Edwards:
If it was downstream it wouldn't make any difference. It wouldn't apply to El Paso.

The Court:
I will overrule the objection and let the proof in, but it is not entirely clear to me that it would be relevant, but I can judge that matter later.

Mr. Edwards:
The document, in addition to that, is in Spanish.

Mr. Guinn:
We can have a translation made. I will offer the original. The others are not in Spanish.

Mr. Edwards:
We are objecting to something we can't read.

Mr. Sims:
Can't Mr. Telles read it to him?

Mr. Guinn:
This is one of the instruments that's filed in our County Clerk's Office.

The Court:
Well, you would have to get a translation of it as far as I am concerned. I wouldn't be able to read it.

Mr. Guinn:
We ask permission to do that.

The Court:
All right.

Mr. Guinn:
Defendant's Exhibit No. 70 is a regulation of waters of the town of Socorro. The Court has the map there before him, Exhibit 1, it shows Socorro, which lies down below El Paso approximately twenty miles.

The Court:
I have noticed it on the map.

Mr. Guinn:
Yes, sir. Well, this is not attempting to translate it but this is a regulation of the people of the town of Socorro, says that they can't live without water, and it was organized—

The Court:
What is the date of it?

Mr. Guinn:
1886. I would like to have it withdraw in order to have a copy made of it.

The Court:
All right.

Mr. Guinn:
Now, this is an ordinance of the same town (referring to another exhibit), ordinance for the town of Socorro, governing the distribution of water, and this is written in English.

Mr. Edwards:
Again we object to that because it is applicable to a town which the Court will take judicial notice is downstream from the City of El Paso.

The Court:
Overruled.

Mr. Guinn:
It sets out here the charges for the use of water and that is all I would like to read to the Court at this time. It merely relates to the charges to be made for the various uses of the water, including domestic, for animals, and for other purposes.

The Court:
Well, it just now strikes me that if it would have any relevancy it would simply bear on historical use of the water for domestic purposes. That is all I see.

Mr. Guinn:
Yes, sir. As I see it, certainly it is not altogether defined, clearly defined, in our law; we didn't follow

altogether civil or common law. Now, our position here is that this goes to support our theory that the State recognized and will recognize the right of the people along there to acquire a right to that water for domestic purposes, and these are evidence of that. Of course, if that has been lost that is something else, but as to whether it existed that is what we offer this now for. This is the same river and in the same Improvement District as is involved in this lawsuit.

The Court:
All right.

Mr. Guinn:
And this is an Act (referring to another exhibit) for the control and management of the acequias in Justice's Precinct No. 1, El Paso County, Texas, June 13, 1888.

Mr. Edwards:
What is the number of that?

Mr. Guinn:
Defendant's Exhibit No. 71.

Mr. Edwards:
Your Spanish instrument, as I understood, was No. 70?

Mr. Guinn:
Yes. Now, No. 71 is the Act for the control and management of the acequias in Justice's Precinct No. 1.

Mr. Edwards:
May we have the same objection to all these instruments, Your Honor?

The Court:
Yes.

Mr. Guinn:
This was approved June 13, 1888, and all we wish to read is that "The following assessments or charges for the annual use of water from the Acequias. . ."—and these fall just outside the city limits but along the river—". . . For domestic use each person or head of a family shall pay for such Acequia water five dollars per annum." And then it sets forth the rest of the charges, the other different charges.

The Court:
Now, let me get that one identified.

Mr. Guinn:
No. 71.

The Court:
What is it?

Mr. Guinn:
This is an Act passed by the Commissioner's Court of El Paso County, Texas, regulating the obtaining of water for domestic purposes, and people along this river, permitting domestic use for certain charges outside the city limits, which is adopted under the laws of this State.

The Court:
All right.

Mr. Guinn:

Now, No. 72 is another one which I also ask permission to withdraw and translate or have translated, rather, because it is in Spanish. It was filed with the Clerk and it is dated 1879, and it relates to the regulation of water in the town of Ysleta, which the Court will notice from the map is just below El Paso.

The Court:

Yes, all right.

Mr. Guinn:

Now, No. 73 is an ordinance for the regulation of water for domestic purposes and other purposes, by the City of San Elizario, which the Court will notice is just slightly down the river than Socorro. And then this one, No. 74, relates to the town of Socorro, in English.

The Court:

All right.

Mr. Guinn:

I think that is all I had of Mr. Telles.

Mr. Edwards:

Then our objections go to your Exhibits 70, 71, 72, 73 and 74?

Mr. Guinn:

That is right.

The Witness:

If I may say, these are original permanent records that have just been introduced, in the custody of the

County Clerk's Office, and I am just wondering what the status will be of the documents.

The Court:
Is there any objection to letting the County Clerk have these back as the regular custodian of the records, and they will be available for any further purpose of this suit.

Mr. Edwards:
I think so. I think his duties would require him to keep them.

The Witness:
I might add that they can be photostated and copies made if so desired.

The Court:
We will let counsel arrange that.

(Witness excused.)

Defendant's Exhibits 70 through 74, both inclusive, were thereupon considered received in evidence. Exhibits 70 and 72 are not relevant to points of appeal and are to be omitted from the record in accordance with agreement of counsel. Defendant's Exhibits 71, 73 and 74 are copied on the pages following:

Exhibit D-71—Act of El Paso Commission Court, June 13, 1888:

Exhibit D-73—Ordinance No. 10, December 6, 1893:

Exhibit D-74—Ordinance of the Town of Socorro, February 14, 1887;

Omitted from the Printed Record, Pursuant to Designations of Counsel as to Printing Record, copied at pages 1 et seq.

Mr. Guinn:

I got a little out of order in my exhibits. Defendant's Exhibit No. 68 is the El Paso Irrigation Company's Additional Franchise, dated 1890.

Mr. Edwards:

No objection.

Defendant's Exhibit No. 68, which was read by Mr. Guinn, was received in evidence by the Court, and same reads in words and figures as follows:

"D-68".

El Paso Irrigation Company—Additional Franchise.

Section 1. Permission and right of way is hereby given to the El Paso Irrigation Company to extend their irrigation canal from the point of rocks where their franchises and right of way began under the ordinance of September 16, 1889, up the river, along the American bank thereof, through the city limits, along or across any streets, highway or other property or rights then belonging to said city, without damage to individual or vested rights therein, and at such points of contact with the present El Paso acequia, and especially that portion described as follows, to wit: Beginning at a point ten feet south of the

waste weir below the pumping house of the El Paso Water Company; thence down the said acequia 190 feet and terminating in the present channel of said acequia.

Permission is hereby given said El Paso Irrigation Company, under the regulations hereinafter provided, to flume said El Paso acequia at its own expense, under the supervision of and to the satisfaction of the City Engineer, in such manner that it will not interfere with the accustomed flow of water therein, or in any way impair the usefulness thereof.

Provided, that the rights and privileges herein conferred shall not be entered into or enjoyed by said El Paso Irrigation Company until it shall first have agreed in writing that it will so take and use the rights and privileges herein conferred without in any manner interfering with the accustomed flow of water in, or in any other manner impair the usefulness of said El Paso acequia, and that in the construction of said flumes it will, at its own expense, build, maintain and keep in repair the same, under the supervision of and to the satisfaction of the City Engineer; and provided further, that the said El Paso Irrigation Company shall agree in writing that in the event that immediate action is necessary to repair and maintain said flumes at any time upon the part of the city, that said city may do, or cause to be done, the same and charge the expenses, thereof to said company, and that said company shall agree to pay on demand the expenses thereof, or forfeit all rights and privileges herein conferred; and provided further, that said company shall agree in writing to hold the city harmless from all and every damages, costs and

expenses by reason thereof; and provided further, that said Irrigation Company shall give bond, with good and sufficient sureties, in the sum of one thousand dollars, payable to the City of El Paso, conditioned that it will faithfully perform the obligations imposed by said contract for the term of five years from this date.

Section 2. This ordinance shall take effect from and after its passage and approval.

(Approved Feb. 7, 1890; recorded in Minute Book F, page 140.)

11 3 54.

A true and correct copy, I do hereby certify:

(S.) J. M. HERRERA,
(Seal) City Clerk.

Mr. Guinn:

And then I will offer Defendant's Exhibit No. 69, being the bond given by the company.

Mr. Edwards:

All right.

Defendant's Exhibit No. 69, being received in evidence, reads in words and figures as follows:

"D-69"

Regular Meeting, May 23, 1890 as recorded in Minute Book F Page 220.

The following bond given by the El Paso Irrigation Company was approved:

State of Texas,
County of El Paso.

Know all men by these presents, that the El Paso Irrigation Company a private corporation duly incorporated under the laws of the State of Texas, as principal, and A. M. Loomis, E. S. Newman, W. M. Iames, S. Schutz, Allen Blacker, and Richard L. Mayer, as sureties, acknowledged ourselves bound to pay to the City of El Paso the sum of One Thousand Dollars. The condition of the above obligation is such that whereas the said El Paso Irrigation Company, and the said City of El Paso have entered into a contract in substance as follows, to wit:

The State of Texas,
County of El Paso.

This indenture, made the sixteenth day of May, A. D. 1890, between the City of El Paso a municipal corporation duly incorporated under the laws of the State of Texas, acting by its Mayor, Richard Caples, who is specially authorized by a resolution of the City Council of said city to sign these presents, and the El Paso Irrigation Company, a corporation duly incorporated under the laws of the State of Texas, and whose principal office is in El Paso, El Paso County, Texas, acting herein by Allen Blacker, its president, who is specially authorized by a resolution of the Board of Directors to sign these presents.

Witnesseth: That the City of El Paso, for and in consideration of the promises, agreements and covenants by the said El Paso Irrigation Company, as

hereinafter stated to be kept and performed, has Given and Granted to the said El Paso Irrigation Company, as hereinafter stated to be kept and performed, certain rights, privileges, and franchises more fully set forth in an ordinance entitled, "An Ordinance granting certain Franchises to the El Paso Irrigation Company" approved February 7th, 1890, which ordinance is made a part of this contract.

In Consideration Thereof, the said El Paso Irrigation Company does covenant and agree with the City of El Paso that it will do and perform as follows: First: That it will so take and use the rights, privileges and franchises conferred on it by said City of El Paso, under this contract and under the ordinance aforesaid, without in any manner interfering with the accustomed and usual flow of water in, or in any manner whatever impairing the usefulness of said El Paso Acequia. Second: That whenever it may be necessary to construct flumes to convey the water in said El Paso Acequia, the said Irrigation Company will, at its own expense, build, maintain and keep in repair the same, under the supervision of, and to the satisfaction of the City Engineer, and of such capacity to carry the usual and customary flow of water therein at its floods.

Third: That whenever immediate action is necessary to repair and maintain said flumes, upon the part of the city, which necessity may be judged either by the Mayor, the City Council of said City, or any officer charged under the law and ordinance of said City, with the care of said acequia, that said city may do or cause to be done, the same, and may charge the expenses thereof to said Company, which

charges the said Irrigation Company agrees, with legal interest, to repay to said City.

Fourth: That the said Irrigation Company covenants and agrees to hold the said city harmless from any and all damages, costs, and expenses of all kinds incurred, growing out of the construction, maintenance or repair of said ditch, whether in said fluming or elsewhere along the line of the right of way granted by said ordinance, whether said damages shall consist in money or labor extended in said construction, maintenance or repair, or by reason of any obligation on the part of the city to maintain the proper flow of water therein, or any other obligation imposed upon said city in the care of said acequia.

Fifth: That the Irrigation Company agrees that it will furnish a bond in the sum of One Thousand dollars payable to the City of El Paso, with good and sufficient sureties, conditioned that for the term of five years from the date of the ordinance, it will well and truly perform all the obligations imposed on it by this contract, which bond is given as additional security to said City, and does not, in any manner limit or impair the terms, amount or security imposed under this contract.

In witness whereof the said parties have hereunto set their hands and seal, this the sixteenth day of May, A. D. 1890.

(Signed) CITY OF EL PASO,
By RICHARD CAPLES,
Mayor.
(Signed) EL PASO IRRIGATION CO.,
By ALLEN BLACKER,
President.

Attest:
(Signed) RICHARD L. MAYER,
Secretary.

11/15/54.

A true & correct copy, I do hereby certify:
(S.) J. M. HERRERA,
(Seal) City Clerk.

(At this point an instrument was marked for identification as Defendant's Exhibit No. 75 and handed to opposing counsel for examination.)

Mr. Guinn:
We would like to offer at this time Defendant's Exhibit No. 75, which is a Water Consumption Tax Receipt for Acequia given to the Clerk of the County for furnishing water from the Acequia.

Mr. Grambling:
What is the date of that?

Mr. Guinn:
I don't think it bears a date. It is in the form of a receipt.

Mr. Sims:
It is 1887.

Mr. Guinn:
It is for the period commencing March 1st, 1887 and ending March 1st, 1888.

The Court:
It is from the City to the Clerk of the County?

Mr. Guinn:
Yes, sir.

The Court:
All right.

Mr. Guinn:
We offer Defendant's Exhibit 75 at this time.

Mr. Edwards:
Yes, no objection.

Defendant's Exhibit No. 75, being the Water Consumption Tax Receipt in question, was thereupon received in evidence by the Court, and same reads in words and figures as follows:

"D-75"

Collector's No. 26

Acequia.

Water Consumption Tax Receipt.

City Assessor and Collector's Office, El Paso, Texas.
Received of Clk of County the sum of Forty Two (in Co. Warrants) Dollars which entitled him to a license from the Mayor to use water from the Acequia for the period of one year Commencing Mar 1st, '87 Ending Mar 1, '88.

Class No. 1, Lots .....

Class No. 2, Acres on grounds of court house & jail.

Class No. 3, Acres .....

Class No. 4, Domestic Use .....

Class No. 5, Brick Making, No. Ms .....

Class No. 6, Adobe Making, Nos. Ms .....

Class No. 7, Watering Animals, No. Head .....

Class No. 8, Watering Sheep & Goats, No. Head ...

Class No. 9, Any Other Use 50 Cents Per M Gals

(S.) H. GLAZE,

City Assessor and Collector.

Commissioner.

Mr. Brockmoller:

If it please the Court, I would like the Court to take judicial knowledge of the Treaty between the Republic of Texas and the United States Government by virtue of Resolution of Congress of December 29, 1845, found in 9 U. S. Statutes at Large, 108; and in that connection we would like to read and introduce into evidence Article 5415 of the Revised Civil Statutes of Texas: (reads)

"To bring the provisions of law relating to the public domain together, the following extract is made from the joint resolutions of the Congress of the United States for annexing Texas to the United States, approved June 23, 1845: 'Said State, when admitted into the Union. . . . shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of debts and liabilities of

said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct.' "

I would like to introduce into evidence the Acts of 1905 of the Legislature of Texas, found presently in Article 5242 of the Revised Civil Statutes of Texas:

"The United States Government through its proper agent, may purchase, acquire, hold, own, occupy and possess such lands within the limits of this State as it deems expedient and may seek to occupy and hold as sites on which to erect and maintain light houses, forts, military stations, magazines, arsenals, dock yards, custom houses, post office and all other needful public building, and for the purpose of erecting and constructing locks and dams, for the straightening of streams by making cutoffs, building levees, or for the erection of any other structures or improvements that may become necessary in developing or improving the waterways, rivers and harbors of Texas and the consent of the Legislature is hereby expressly given to any such purchase or acquisition made in accordance with the provisions of this law."

Then I would like to read a portion of the Acts of 1943, 48th Legislature, Page 278, Chapter 175, found as Article 5415b of the Revised Civil Statutes:

"Section 1. The State of Texas hereby accepts the Act of Congress approved February 9, 1940, H.R. 6124, 54 Stat. 21, and hereby accepts as part of its territory, and hereby assumes civil and criminal jurisdiction over, all those certain parcels or tracts of land lying adjacent to the territory of the State of

Texas which were acquired by the Government of the United States of America by virtue of the convention between the United States of America and the United Mexican States signed February 1, 1933."

In addition, I would like to introduce, or, rather, read into evidence a portion of the Acts of 1949, 51st Leg., Page 902, Chapter 483, of the State of Texas, found as Article 5248g of the Revised Civil Statutes of Texas:

"Section 1. The Governor of the State of Texas is hereby authorized to grant to the United States of America in accordance with the conditions hereinafter set out, such of those portions of the bed and banks of the Rio Grande in Brewster, Cameron, Hidalgo, Hudspeth, Jeff Davis, Kinney, Maverick, Presidio, Starr, Terrell, Val Verde, Webb and Zapata, Counties as may be necessary or expedient in the construction and use of the storage and flood control dams and their resultant reservoirs, diversion works and appurtenances thereto, provided for in the Treaty between the United States of America and United Mexican States, concluded February 3, 1944."

I would next like to read into evidence the Acts of 1925, 39th Leg., Chapter 155, Page 366, Section 1, now found as Article 7467a:

"The State of Texas hereby relinquishes, quit claims and grants unto all incorporated cities and towns that have a population of forty thousand inhabitants, or more, according to the 1920 census, all of the beds and channels, and also all of the abandoned beds and channels, of all rivers, streams and

other channels that are now or that may hereafter be within the present or future corporate limits of such cities or towns, in so far as the beds and channels, and such abandoned channels, of such rivers, streams and other channels may be owned or claimed as the property of said State."

Mr. Grambling:

Your Honor, we are about through. We would like to have, if we could, a few minutes recess to see if there is anything else we might need to put in.

The Court:

All right. Mr. Marshal, recess Court for fifteen minutes.

At this point a recess was had from 3:00 o'clock P.M. until 3:15 o'clock P.M. the same day, at which time proceedings were resumed as follows:

Mr. Brockmoller:

I would like for the Court to take judicial notice of the Treaty between the United States of America and the United Mexican States of February 2, 1848, proclaimed July 4, 1848; and I would like to read a portion of Article V, first paragraph, in evidence:

"The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch, emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point

where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called Paso) to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

Article VII

The River Gila, and that part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the Fifth Article, divided in the middle between the two republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels, or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or

contribution, this shall not be done without the consent of both governments."

(At this point an instrument, consisting of several pages, was marked for identification as Defendant's Exhibit Number 76 and was shown to opposing counsel for examination.)

Mr. Brockmoller:

I would like to introduce into evidence at this time the City Charter of the City of El Paso, together with amendments to November 13, 1954. This is Defendant's Exhibit No. 76.

Mr. Edwards:

No objection.

(Defendant's Exhibit No. 76, being the entire Charter of the City of El Paso, was thereupon received in evidence by the Court, and same is not being copied in the record but is to be transmitted as an original exhibit to the Court of Appeals by order of the Trial Court.)

W. F. RESCH, was recalled to the stand by the Defendant, and testified further as follows:

On Direct Examination

Questions by Mr. Grambling:

Q. Mr. Resch, there was discussion yesterday by Mr. Phillips in which he stated that the City took water, both from the Franklin Canal and the river intake, during the irrigation season. I am not certain

that it has been brought out what is the irrigation season. Would you tell us what is the irrigation season and what is the non-irrigation season, whichever you wish to tell us?

A. In years of normal water supply the release of water from the reservoir to begin irrigation is usually around February 1st. The release continues until about September 21st. The gates are then closed and re-opened once in October, once in November and once in December. Under the present water shortage the average release date has been about March 15th and the average closing date about September 12th, with no release during October, November, December, January and February.

Q. In other words, there is no release between those two dates?

A. Yes, sir.

Q. And how long has that condition been existing?

A. About the last four years.

Q. That would be for '50, '51, '52 and '53?

A. No, '51 through '54.

Q. Now, Mr. Resch, would you tell us—there has been some discussion here about the El Paso Electric Company—would you tell us where the El Paso Electric Company is located with reference to this International Dam? It is North of it, is it not?

A. Yes, sir, approximately four and a half or five miles upstream.

Q. That is along the river route?

A. Yes, sir.

Q. Now, would you tell us where the American Smelting and Refining Company plant is located with reference to the International Dam?

A. Approximately a mile above the International Dam.

Q. Would you tell us where the cement plant is located, the Southwestern Portland Cement Company, I think is the exact name of it?

A. That is above the American Dam.

Q. That is above the American Dam?

A. Yes, sir, approximately half a mile.

Q. Above the American Dam?

A. Yes, sir.

Q. And where is the McNutt Refinery with reference to the American Dam or the International Dam?

A. The McNutt Oil Refinery is perhaps a mile and a half above the American Dam.

Q. And the Globe Mills; where is it located?

A. The Globe Mills is almost directly Northeast of the bulge on the blackboard drawing there (indicating) labeled "sand trap".

Q. Then it would be at very close proximity to the International Dam, I take it?

A. Yes, sir.

Q. And I believe Mr. Phillips testified yesterday that all of those industries are taking water out of the river?

A. Well, I am not certain about the Globe Mills.

Q. But all the rest of them are taking it out?

A. And I have heard that the McNutt Oil Refinery is but I don't know it to be a fact.

Q. And none of them have water rights except the Electric Company has seventy acres?

A. That I don't know.

Mr. Grambling:

That is all.

On Cross Examination.

Questions by Mr. Edwards:

Q. You spoke of the gates being opened once in October, once in November, and once in December in normal years. When you say "opened once" you mean once for how long?

A. A period of from seven to ten days, and between those periods in normal years irrigation continues by using the Project return flow in the various divisions of the Project.

Mr. Edwards:

That is all.

Mr. Grambling:

No further questions.

The Court:

What is the function of this International Dam?

The Witness:

Primarily, Your Honor, the International Dam serves to check the water up in the river so that the delivery could be made to the Mexican Acequia Madre and, originally, the Franklin Canal heading of the Project. A dam, according to some of the earlier writings here was constructed perhaps three hundred years ago.

The Court:

All right.

(Witness excused.)

Mr. Grambling:
The Defendant rests.

LAURENCE E. STEVENS, a witness called by the Plaintiffs in rebuttal, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Edwards:

Q State your name, please.

A Laurence E. Stevens.

Q Where do you live?

A El Paso, Texas.

Q When did you first come to El Paso?

A In May of 1897.

Q Have you taken a rather unusual interest in the City's history since you have been here?

A I have been reared in the real estate business and naturally I had an interest in its growth and also the valley.

Q Does your memory go back to 1900, say?

A Not too well to 1900 because I'd be only five years old then.

Q How far back do you remember?

A Well, on occasions I remember even to that date, but my better memories are along 1901 and 1902.

Q I hand you our copy of the Defendant's Exhibit No. 49, which is a blue print or—what is this, a blue print, photostat, or what?

A Blue and white print.

Q. Of Mills map of the City of El Paso, showing certain acequias or irrigation ditches running through the city at that time, that is, at the time the map was made, which seems to be 1858, is that right, Mr. Grambling?

Mr. Grambling:
That is right, 1858.

Q. Mr. Stevens, with reference to this map, where is the Franklin Canal?

A. The Franklin Canal is not shown on that map it doesn't go far enough to the South.

Q. In other words, the Franklin Canal—just point out where the Franklin Canal runs?

A. The Franklin Canal would be approximately half a mile West of where San Francisco comes in on this map and would go towards the Southeast and would be approximately ten or twelve blocks below here on its east course (indicating).

Q. All right. I will ask you whether or not these acequias, or ditches, irrigation ditches, or canals, whichever you choose to call them, running through El Paso, have been obliterated as far back as 1901 and 1902?

A. I haven't seen them. However, this one (indicating) is where the old Federal Building used to be between Oregon Street and Mesa Avenue and it would come out right towards where Woolworth's store is now.

Q. If there was a ditch there it was filled up?

A. Yes, sir, because the old Federal Building was there.

Mr. Edwards:
That is all.

The Court:

Then do you mean that this Franklin Canal does not traverse any part of the territory shown on this map?

The Witness:

That map does not cover sufficient space to show where the Franklin Canal is.

The Court:

Then that answers my question, I think, that the Canal does not traverse any of the territory enclosed in this map.

The Witness:

No. That is on a smaller area than the Franklin Canal is incorporated in now.

On Cross Examination.

Questions by Mr. Grambling:

Q. Mr Stevens, doesn't the insert in the upper part, in this corner here (indicating), show the Franklin Canal?

A. No, sir. That shows the old El Paso Acequia. The Franklin Canal hadn't come into existence. That was the old El Paso Irrigation Company. It was incorporated—I think, my personal opinion, from all the investigation I have been able to make, is that the Franklin Canal and the old El Paso Acequia was incorporated under one system, just as we have now the entire Rio Grande Project.

Q. What I mean, this insert shows, this insert does show where the Franklin Canal is now at the present time, it shows the area?

A. It shows up towards the Hart's Mill dam, yes, but not down below because it doesn't go far enough East.

Q. Well, the river has shifted too, you know that used to be up by the Mills Building?

A. Well, that was 1827. It has been down there (indicating) since long in the early 80's. It has been disputed as to whether it was by Treaty or not and that created our Chamizal one.

Questions by Mr. Guinn:

Q. This upper corner here on the map shows the Rio Grande River?

A. That is right.

Q. It shows the town of El Paso?

A. That is right.

Q. Now, does that show that the Franklin Canal did run through the town of El Paso?

A. The Franklin Canal is below that. Here is your Acequia Madre on the Juarez side (indicating). This river shown here is considerably above where the Franklin Canal is here today. The 1852 line would run in about where the El Paso Laundry is now.

Q. What we just asked you, this river was the Rio Grande at that time?

A. Oh, yes, I am certain it was.

Q. Well, you know that?

A. Yes, but I have talked to General Mills many times about many of these things—

Q. And the river has shifted down?

A. The river has changed its position.

Q. But you are not telling the Court that the town of El Paso wasn't on the Rio Grande?

A. It was. That is, the town of Paso at that time was really Juarez. We were Franklin as of that date of General Mills—

Q. The boundary lines followed along the river?
A. Yes, and even before General Mills made his survey in 1853.

Mr. Guinn:
That is all.

(Witness excused.)

Mr. Edwards:
Now, at this point, if the Court please, after the introduction of these numerous ordinances of the City of El Paso relating to acequias, I would like to read into the record or offer in evidence the City's version of the development of the water and sewer system. I think it will clarify and give a better idea of just what did take place with reference to the water system and how it developed.

Mr. Grambling:
May I see what you offer in evidence?

Mr. Edwards:
Yes. (Shows to Mr. Grambling) This is part of Plaintiffs' Exhibit No. 107.

Mr. Grambling:
Now, Your Honor, we have no objection to Page 9, that deals with the development of the water system. We do have objection to Page 10, which is simply—

Mr. Edwards:
Well, I read into the record this morning beginning right here (indicating) and I am just going to read that first (indicating).

(Mr. Edwards then read the following from brochure previously introduced, "Plaintiffs' Exhibit No. 107"):

"Development of the Water and Sewer System.

The first houses built in El Paso were constructed along the banks of the Rio Grande, and water for domestic purposes was drawn direct from the river. As the city grew away from the river, water was hauled in barrels. Later small surface wells were dug and equipped with hand pumps.

The city was incorporation in 1875 and the first franchise for a water company was granted the El Paso Water Company in 1881. However, this franchise was transferred to Sylvester Watts in 1882. The rates for domestic purposes were established at five cents per barrel until the city had a population of 8,000 when it was reduced to four cents, and when the population reached 12,000 the ratebecame three cents per barrel.

Mr. Watts built a pumping plant 600 feet east of the viaduct to lift the water from the river to a reservoir built at the present site of Sunset Reservoir. This Sunset Reservoir was emptied in 1953 to check and repair it for the next summer's use and very few leaks were found. It is constructed of masonry walls and is plastered inside. The piping system consisted of an 8" riveted steel pipe fabricated in El Paso. The life of these pipelines was short and they were replaced in 1885 with calomine pipe. The first cast iron pipe was laid during 1888 and most of it is still in service.

In 1892 Mr. Watts drilled thirty 10″ wells 30′ to 40′ deep in the river, but he later abandoned these and secured all water from one large well known as the Watts well, which was 13′ in diameter and 60′ deep.

In 1896 the El Paso Water Company was charging a mixed flat and meter rate for water of 75c per 1,000 gallons without a minimum rate. Only about 3% of the water was metered. At the request from the city to reduce this rate the company decided to meter the city, after which the rate was 20c per 1,000 gallons with a 90c per month minimum for 4,500 gallons. At this time only one other city in the United States was completely metered, and El Paso, with a population of about 13,000 ranked seventh as to the total number of meters installed.

In November, 1902 a franchise was granted the International Water Company to supply domestic and manufacturing water at 20c per 1,000 gallons for domestic use and 12.5c per 1,000 gallons to manufacturers if they could use over 1,000,000 gallons per month. This company began sinking wells at the location of the Mesa Plant in 1904, and in 1906 they hand-dug a 15′ diameter well to a depth of 250′ on the Mesa Plant property. Since they did not have modern lift pump machinery, the well was dug big enough to lower a big steam pump 200′ below the surface to pump water. At 250′ the workers struck quick sand and they had to abandon the hole, after spending $100,000 in digging it, and this helped bring about the city taking over this company on October 27, 1910 for $375,000 and the assumption of $477,000 of first mortgage bonds. The large well was filled in, in March 1928 to make way for a new airport under construction at that time.

By 1917 the city had 44 wells in the North Mesa field, 17 of which had been abandoned and 27 were used in peak flows. The Watts well was still in use in 1918.

In 1919 the Montana Well No. 1 was drilled and was a success, delivering 2 million gallons daily. Headline of the Post in May, 1928 was, 'Great Underground Lake Gives El Paso Its Supply of Water,' and at that time 4 wells were being used in the Montana Field, as the paper said, "A Great Underground Lake with Millions of Gallons of Water Lies at the East End of Montana Street.'

Water prices have varied during the history of El Paso. In 1910 and 1911 the cost was 15c per 100 cubic feet, with a minimum of 90c per month. In 1912 and until June, 1913 water was 22½c per 100 cubic feet, or 30c per 1,000 gallons, with a minimum of 90c. In June, 1913 the price went to 15c per 100 cubic feet until 1918 when it went up to 18-3 4c per 100 cubic feet, with a minimum of $.25 and stayed at that price until 1920 when it was lowered to 16-7 8 c per 100 cubic feet with a minimum of $1.25. This price was in effect until 1927 when it became 15c per 100 cubic feet with a minimum of $1.00. In 1924 the minimum had been lowered from $1.25 to $1.00.

From the above you will see that water was originally obtained from the Rio Grande River and that deep wells were started in 1892, and both the well water and river water were used until 1918. Between the years 1918 and 1943 only deep well water was used in the city. In 1943 the City of El Paso, in conjunction with the U. S. Army, constructed a river water softening and filtration plant capable of treat-

ing and furnishing 10 million gallons daily to the City of El Paso. At that time the peak use was 18 million gallons daily. In 1950 this treatment plant was doubled in capacity to furnish 20 million gallons daily, and since then the city has been using approximately 50% surface water and 50% ground water.

During the past three years six wells have been drilled in the Canutillo, Texas area, pumping shallow well water into the river for use at the river water treatment plant, and five new 2 million gallons per day wells were drilled in the Northeast Mesa.

During the past eighteen months. . ." —well, I read that into the record this morning and will not repeat. At this time we will recall Mr. Hill.

MR. RAYMOND A. HILL, being recalled as a witness for the Plaintiffs in rebuttal, testified further as follows:

On Direct Examination.

Questions by Mr. Edwards:

Q. Mr. Hill, you have already been sworn and you have heard the testimony of Mr. Robert Lowry and have examined the graphs which he has offered in evidence, particularly these large graphs showing the annual flow of the Rio Grande at El Paso for several years, on which he has indicated rather large flows of water at different times, as for instance, I hand you our copy of Defendant's Exhibit No. 3, for the year 1904, indicating a relatively large flow of water in October of that year, is that correct?

A. Yes, sir.

Q. And our copy of Defendant's Exhibit No. 4 for the year 1905. What is reflected there

A. In 1905 the river flow is characterized by a moderate stream flow until May. Then a very large flood flow through May and June, evidently rising from snow melt. The flood in 1904, on the other hand--

The Court:

What was that?

A. I will repeat in part. In 1904 the flood runoff had occurred almost in a matter of a few days in the month of October, evidently due to very heavy rains in the Middle Rio Grande Valley, and such tributaries as the "Puerco", one of the largest flood streams. The flood of 1905 was of longer duration, occurring on May and June, being undoubtedly due to snow melt.

Q. And, for instance, the graph showing the year 1906, which is our copy of Defendant's Exhibit 5?

A. 1906 is a flood of a different character. The total runoff is perhaps not as large as 1905, but much greater than 1904 and a flood of longer duration. I think the point to be made, Mr. Edwards, is that prior to regulation by Elephant Butte the flow at El Paso was characterized by a large flood and then an extended period of rather normal flow.

Q. And does that show effectively in these exhibits that Mr. Lowry has prepared for the various years here through 1913?

A. Yes, sir. I believe the exhibits show that accurately.

Q. Now, he has also indicated from certain other exhibits in his testimony that in 1889 to 1915 the average annual flow, I think, was 830,000 acre-feet, and

from 1916 to 1951 it was 594,000 acre-feet, making a difference of 236,000 acre-feet. What significance do you attach to that?

A. Well, actually, there is very little significance to those figures because the average prior to 1915 includes flood flows which passed through the El Paso alley of short duration, perhaps only a month or so, and of such magnitude that they were not usable in the El Paso Valley. The averages since 1915 represent flows in the Rio Grande at El Paso which are, with few exceptions, controlled flows, so that practically all of the water is usable in the El Paso and, of course, in the Juarez Valley, so that while the figures I believe that Mr. Lowry gave are correct; he correctly answered the question which was asked him, which was the annual flow; that applies to the actual water and not to the usable portion of that water.

(At this point an instrument was marked for identification as Plaintiffs' Exhibit No. 152.)

Q. I will now hand you Plaintiffs' Exhibit No. 52 and ask you to state what that is and from what sources you prepared it?

A. This is a folder containing daily hydrographs of the flow in the Rio Grande at the gauging station just above El Paso for each year, from 1938 to 1953.

Mr. Edwards:

Suppose we offer that in evidence and let you use a copy and hand that to the Court.

(Plaintiffs' Exhibit No. 152 was thereupon received in evidence by the Court. It is not adapted to being copied and same is to be transmitted to the Court of

Appeals as an original exhibit by order of the Trial Court.)

Q. Now, would you use that in connection with your testimony which you have just given by way of further illustration and explanation?

A. Yes, sir. For example, in the year 1938, which is the first sheet in this folder—to explain the diagram, the scale horizontally is, of course, days and months; the scale vertically is 1,000 cubic feet per second mean daily discharge per inch of vertical height. The irregular line crossing the page is drawn in steps each one day in width because the values are mean daily dischargs and not instantaneous flows and it is customary to depict them in this manner when they are averages for the day. The significant point of the year 1938 is that the flow increased in February and in March, and then held fairly constant throughout the months of April, May and June, with exception of three or four sharp and sudden rises which were undoubtedly due to local tributary in-flow, that is, flash floods in streams below Caballo Dam. It held in the order of a thousand cubic feet per second, or somewhat normal, until early in September, and then dropped off. I might point out that, as the questions just asked Mr. Resch, that the gates were opened for a few days in October, November and December, and the effect of that is shown on the graph by the rise in flow at El Paso around the 20th of each of those months. The same situation in 1939. The river began to rise early in February, following the opening of the gates at Caballo Dam, holding fairly constant during the summer, diminishing rather rapidly when the gates were closed about the middle of September, with short periods of rise due

to the opening of the gates for a week, roughly. We find the same pattern, generally, in 1940, except the records—if my memory serves me correctly—show that Elephant Butte Reservoir and Caballo Reservoir, which collectively are called "project storage", were a very low stage in 1940, and apparently the Bureau did not permit a release in November and December. In each of the years you will notice that prior to the irrigation season and following it, for example, for the year 1951, which is one of the driest years of record in the Rio Grande, there was still flow in January and February and until the 10th of March, which flow originated to my own knowledge from the drain return flow on the project drainage out-flow, then the gates were opened at Caballo—presumably about the 6th or 7th of March—because the rise occurred in El Paso on the 11th; and then again, after the gates were closed in September there was still residual drain flow throughout the year. The river did not go completely dry at El Paso at any time although in 1952 it got down to very small volumes in March—again in '53 in the early Spring. With respect to Mr. Lowry's statement of the difference in the averages, with which statement I have no quarrel, I accept his arithmetic; the point is, that while there has been less water passing out of the Mesilla Valley here at El Paso since Elephant Butte Dam was built, most of the water which is measured at the El Paso station, the head of the canyon here, is usable water that can be diverted for use beneficially and for any and all purposs, while the larger volumes which prevailed prior to the construction of Elephant Butte Dam consisted mostly of flood flows which not only were not beneficial, they actually caused injury in this valley.

Q. Now, Mr. Hill, you recall that yesterday the defendants offered in evidence their exhibits 19 and 29, I think, subject to our request for an opportunity to check them. Now I hand to you Defendant's Exhibit No. 19, which shows, "Water Diverted at Treatment Plant, Shallow Well Water Produced at Plant" and items here set forth—

A. I have a copy on which I made certain notes, if I may use that.

Q. All right. I will show the original to the Court. And there is only one of these penciled memorandum, which is Defendant's Exhibit No. 29; and then the Plaintiffs' Exhibits 148a, 148b, 148c, and 148d, which according to Mr. Phillips' testimony, showed the amount due and delinquent by the City of El Paso for water diverted by the City of El Paso through Project facilities under the contract dated August 10, 1949, and water diverted by the City of El Paso through Project facilities from wells in the Canutillo area, less transportation losses. Now, have you carefully examined the exhibits offered by the defendant, that is, Nos. 19 and 29, and also the data in the office of the Bureau of Reclamation, for the purpose of reconciling those figures and determining once and for all whether or not there was any charge made to city for any water that the City had pumped from the river bed instead of out of project facilities?

A. Yes, I made such a comparison. I think it would be—

Mr. Grambling:

Your Honor, we don't believe that this is a proper subject of expert testimony. We think that the man who is to testify about that is the man who is in charge of it, Mr. Phillips. He made out the bills. And

we just don't believe that this is a question of expert testimony at all.

Mr. Edwards:

If the Court please, we have the records here and we have the figures, and Mr. Hill is prepard to show that there was no billing for water from the Rio Grande in these bills that were introduced in evidence by Mr. Phillips yesterday and will show the figures from their exhibits and exhibits furnished by them to the Bureau, to show that the statements are correct. It is a matter of arithmetic.

Mr. Grambling:

We object to that. We are taking secondary evidence where you got primary evidence.

Mr. Edwards:

You got primary evidence right here.

Mr. Grambling:

No. Mr. Phillips is the primary evidence. Mr. Phillips is the one who kept the accounts and he is the one who made these up and he is the one that should be called, and we are not willing for just anybody to come up here and give a mathematical explanation of what occurred. You can do anything with figures.

Mr. Edwards:

We are trying to reconcile your exhibits.

The Court:

I will overrule the objection.

Q. Proceed, Mr. Hill.

A. I would like to refer first to Defendant's Exhibit 19, which pertains to water diverted at treatment plant and shallow well water produced at plant in acre feet, the tabulation by months, when one compares the third column under each month, which is labeled "Net River Water", with the records in the office of the Bureau of Reclamation which I personally examined last night; from my notes I find for the four fiscal years or water years from September 1, 1950—or, October 1, excuse me, 1950, to September 30, 1954, that exhibit, Defendant's Exhibit 19, shows a total of net river water delivered from the treatment plant into the City mains in the amount of 7450.7 acre-feet.

Mr. Grambling:
How much was that figure?

The Witness:
7,450.7.

Mr. Grambling:
Is that for the four years?

The Witness:
No. That is for the year from October 1, 1950 through September 30, 1951.

Mr. Grambling:
What is that figure?

The Witness:
7,450.7

A. The records I examined last night show a total for the same twelve months—

Mr. Grambling:
Let me ask you something. Are you talking about a water year?

The Witness:
Water year.

Mr. Grambling:
In other words, you are matching a horse against a cow. You can't compare a water year to a calendar year.

The Witness:
No, but I will come back and compare it month by month so you can compare it directly.

A. The total in our records was 7,700.8. In each month, except March, August and September, there was either exact agreement or substantial agreement between the records. By "substantial agreement" I mean out of figures such as "915.0" out of Exhibit 19 the Bureau records showed "914.9." In a few places they are tenths of acre-feet generally. Th first discrepancy I found was, the City's exhibit, Defendant's Exhibit 19, showed 130.4 in March of 1951. The Bureau of Reclamation data showed 214.7. In August, the City's exhibit showed 643.9 while the Bureau tabulation showed 758.6. In September the City's exhibit showed 958.3 and the Bureau records showed 1,010.1. For the water year 1951-1952, from October 1, 1951 to September 30, 1952, the total on Defendant's Exhibit 19 was 9,249.7. The total according to the Bureau

Records for the same period was 9,210.1. Each month checked or was in substantial agreement within a few tenths of an acre-foot except the month of February 1952 in which the City's exhibit—perhaps I shouldn't use that term, but it's the caption that I noted—Exhibit 19 showed 885.0 while the Bureau of Reclamation records showed 843.0. In the 1952-1953 water year the total of the values on Defendant's Exhibit 19 were 11,087.1; the corresponding values in the records of the Bureau were 11,088.5, a substantial agreement in all months. For the water year ending September 30 1954 the total according to Defendant's Exhibit 19 was 7,927.2; the Bureau of Reclamation records showed 8,229.3. The differences occurred in the months of October, November and December of 1953 and as a small difference in the month of March 1954. I examined the records further to see why there were differences because I found only eight months out of forty-eight in which there was any substantial difference in the two sets of data. The difference for the month of March, 1951, in which the Defendant's Exhibit 19 showed 130.4 acre-feet while the Bureau of Reclamation records showed 214.7, arose from a tabulation of the figure 84.3 under the column "Shallow Wells", for the month of March 1951. The records carried the notations that 'that pumping was done but the water was not delivered into the mains at that time. The next two months are August of '51 where the records in Exhibit 19 show 643.9 while the Bureau records show 758.6. The difference is due to 114.7 acre feet of Canutillo well water being included in the Bureau totals and on Exhibit 19 being included in the 443.8 acre-feet pumped from shallow wells. The same difference occurred in the following month where therewas 51.8 acre-feet of Canutillo well water

ncluded in the Bureau tabulation of the total, while on Exhibit 19 that quantity is included in the 175.8 of shallow well waters. The next month in which there is a discrepancy is February, 1952, where the Exhibit 19 shows 885.0 acre-feet delivered from the plant to the mains, and the Bureau records show 843. The difference there was due to the Bureau records showing a deduction of 42 acre-feet which was pumped from shallow wells while the Exhibit 19 does not take credit for that deduction. The remaining months of discrepancy are in the last year. There are three, in October, November and December, which differences are equal to the values listed on Defendant's Exhibit 19 under the heading "Shallow Wells", for the year 1953, of 34.3 acre-feet in October, 76.1 in November and 184.5 in December. According to Exhibit 19 those quantities were water that was delivered to the mains, delivered into the water distribution system of El Paso, which originated from shallow wells. The notation on the record was that those quantities were pumped from the shallow wells but delivered into the Canal for flushing the channel in alleviation of the nuisance caused by the sewage collecting downstream. The remaining difference was in March of 1954; the City's values shows 17.2 of river water delivered to the mains of the City while the Bureau records show 24.2; the discrepancy I could not account for, but is not large in any case; but to repeat, the total in the four water years from October 1, 1950 through September 30, 1954, according to the Defendant's Exhibit 19, was 35,714.7 acre-feet. The corresponding records of the United States Bureau of Reclamation on file in the office downstairs, showed 36,228.7, an overall difference of 514 acre-feet; the Bureau records being that much larger, that is a little over one per cent.

That completes my comments on Exhibit 19. You wish me to refer now to Exhibit 29?

Q. Yes, Proceed now to Exhibit 29.

A. Exhibit 29 is the penciled sheet with the caption "Acre feet of water to treatment plant and percent of total from river", for part of the year 1950, actually starting with June of 1950 and continuing through, by months, through September, 1954. The Exhibit 29 has three figures for each month, the figure preceded by the letter "R" which signifies, as I understood the testimony yesterday, as being the metered quantity taken through the river intake plant of the City for use at the treatment plant; and the figure "C" preceding the quantity which is the water taken from the Franklin Canal and put through the treatment plant; and then a percentage figure which is a percentage of the total of those two figures that came from the river system, that is, the intake pumping plant of the river. A direct comparison was not possible between these figures because on Defendant's Exhibit 29 they are the gross quantities delivered to the treatment plant and certain waters used in the treatment process, for backwashing and other purposes, so that the figures on Exhibit 29 are larger than the figures on Exhibit 19, but percentage-wise we can compare them because it is my understanding that in the proration, both the City and the Bureau in proration have merely applied a constant percent to the gross quantities, so for purposes of comparison I prepared a table of the percentage of river water delivered into the City mains which originated at the river pumping plant of the City which corresponds to the percentage figure given on Exhibit 29. I find from examination of the records that there is agreement within one or two tenths of a percent between the

values on Exhibit 29 and the corresponding values in the records of the Bureau in all but a few months, for the 48 months of comparison the months of March 1951, May 1951, July 1952, April 1953, July 1953, September 1953, and September 1954. In all other months there is either a flat check or within the error of slide rule operation. The discrepancy in March, 1951, according to Defendant's Exhibit 29, only 23.7% of the water delivered into the City mains originated at the intake pumping plant. That is what we call he "river intake", I believe, on the sketch on the board (indicating); while the Bureau of Reclamation values showed 74.9% coming from the river. The discrepancy in May, 1951, was not a discrepancy in records. It was merely a case of the wandering decimal point. There was an error in calculation on Defendant's Exhibit 29, where it is reported 1.1% but actually it is 10.9%.

The Court:

Where is that now?

A. On May, 1951, in the percentage column, there is a figure of 1.1%.

The Court:

Yes.

A. That should be, from the Bureau records, it is 10.9. So it is either 11.0 or 10.9. It is merely an error in calculation. The next difference is in July, 1952, in which the City's Defendant's Exhibit 29 shows 2.4% coming directly from the river, while the Bureau records showed 1.1. In that year there was a breakdown of figures, there was about ten or twelve acre-feet difference in the calculations, and I couldn't

reconcile it any closer than that. In the next year, in April, 1953, Defendant's Exhibit 29 shows 30.2 while the Bureau of Reclamation data shows 21.1. That is an error in calculation as to the 30.2 because the amount shown there as being pumped from the river was 243.8 acre-feet, and 910 acre-feet taken from the Franklin Canal, which computes to be 21.1 and not 30.2; and the 21.1 does check with the Bureau figure. In July of 1953 there was a difference of 2% ; Exhibit 29 showed 26.7 and the data in the Bureau of Reclamation office showed 24.7. In September of 1953 the Exhibit 29 showed only 9.9% taken from the river directly and not from the Canal, while the Bureau of Reclamation figures show 53.3. I believe that was due to the fact that the exhibit shows there was taken from the river only 72.7 acre-feet because the record hows there was quite a large amount of water pumped from the river in that month. If that is assumed on Exhibit 29 to be 727 instead of 72.7 then the percentage is 52.5, which compares quite closely with the 53.3 in the Bureau data. The only remaining month of any discrepancy is September of 1954 and that was too small for me to chase down. Besides, it was getting late. It was 35.4 on Defendant's Exhibit 29 and 36.2 on the Bureau of Reclamation records. Now, those percentages on the Bureau of Reclamation records are determined from a breakdown of water in several classifications: the water taken from the Franklin Canal and delivered to the treatment plant and from there delivered to the mains; the net amount is in four classifications, the allotment of stored water, the return flows used, that is the drain water that is pumped, the credit given for water from the Canutillo wells, and then arroyo and waste water. The same classification is given for the water pumped from the

Rio Grande directly at the intake pumping plant, the allotment of stored water, the return flows pumped directly from the river, the Canutillo well water that is taken directly from the river, and any arroyo and waste water. The totals, then, pumped, according to the records, from the Franklin Canal and not from the river were 4,791.7 a re-feet in the twelve months from October 1, 1950 to September 30, 1951. In the next year, 6,583.7 taken from the Franklin Canal and delivered into the City mains. That is the next water year. In the water year 1952-53 it was 5 835.8. In 1953-54, 6,320.4. In the same years, 1950-51, the total taken from the Rio Grande was 2,909.1; in 1951-52, 2,626.4; in 1952-53, 5,252.7; in 1953-54 1,926.9. None of the latter figures were used in computing the quantity of water shown on the exhibits and statements for the four water years. I compared the figures on these statements—I do not know the numbers—

Q. That's Plaintiffs' Exhibits 148a, 148b, 148c and 148d.

A. The figures used in making up that statement, Exhibit 148a, are exactly the same for the year 1950-1951: Diverted from Franklin Canal, return flow water delivered into the City's mains was 2,205.2 acre-feet. Canutillo well water diverted from Franklin Canal delivered into mains, 166.5 acre-feet. In the following year, 1951-52, return water—that is, drainage water—diverted from the Franklin Canal and delivered into mains, 2,295.9; Canutillo well water diverted from Franklin Canal and delivered into mains, 2,059.1 acre-feet. For the third year 1952-53, return flow water diverted from Franklin Canal: 991.3; arroyo and waste water diverted from Franklin Canal: 125.7; Canutillo well water diverted from Franklin Canal delivered into City system 2,334.9. This last year,

1953-54, return flow waters diverted from Franklin Canal: 437.7; arroyo and waste water: 8.1; and Canutillo well water diverted from Franklin Canal: 4637.1. The totals for each year correspond to the totals on the exhibits, Plaintiff's Exhibits 148a, b, c, and d.

Q. Can you say, then, with definiteness that the City was not billed for any water taken in from the river through the river intake at the treatment plant?

A. Well, I will have to answer this way, Mr. Edwards, that the quantities on the bills correspond to quantities in the Bureau records whi h include no water taken directly from the river. It includes only water taken from the Franklin Canal at the treatment plant; and the records of the Bureau of Reclamation which I examined agree, with a few minor exceptions, with Defendant's Exhibits 19 and 29.

Mr. Edwards:

You may take the witness.

On Cross Examination.

Questions by Mr. Grambling.

Q. Now, I believe, Mr. Hill, that Exhibit 19 of the Defendant showed 35.714 acre-feet of water that they pumped through that treatment plant into their system during the years you are talking about?

A. Yes, sir.

Q. And I believe the U. S. Bureau of Reclamation figures, according to your statement, showed 36.228 acre-feet of water?

A. That is correct.

Q. Now, what is the total water that is billed to the City on those exhibits 148a, b, c and d?

A. Just a moment. I will have it for you. (Writes on paper) I make the total 15,261.5 acre feet.

Q. All right, how can you say that the District does or does not charge the City for water taken, for any water taken out of the river intake there?

A. I am personally confident that no charge was made, sir.

Q. Well, now, you know, do you not, that the City has paid for water which they used under the charges for this land that they have, this fourteen hundred acres of land; and I believe they are entitled to two acre-feet, are they not, without any extra charge?

A. I think that varies. I didn't understand your question, so, Mr. Grambling, I would like to simplify the answer: I assumed but I did not verify those bill. I understood there was no question about them. There was allotment water. That is what you are referring to, I believe.

Q. Yes, sir. Right now I am.

A. Allotment water pumped from the Rio Grande direct at your river plant in 1950-51: 21.5 acre-feet. In 1951-52 it was 192.9 acre-feet. In 1952-53: 876.3 acre-feet; and in 1953-54: 19.4 acre-feet. Now, I assume that a charge was made for that water, as in that situation the City was simply acting the same as any other landowner, so I didn't mean to say that that had not been billed.

Q. To that extent, at least, water taken out of the river was billed against the City?

A. Yes, sir. I think the City merely elected to take it from that point for some reason.

Mr. Edwards:

You mean the allotment for water-right land, Mr. Grambling? Is that what you are talking about?

Mr. Grambling:

I mean part of the water for water-right land was taken out of the river at the river intake, he has enumerated the number of acre-feet

Q. Well, the effect of that, Mr. Hill, was that the District called the water taken out of the river allotment water and then any water above that they called "extra water", didn't they?

A. I think you would have to examine the months in which these happened.

Q. Well, you seem to have made a pretty careful examination?

A. I did.

Q. Well, you know as a practical problem, as a mathematical certainty, what the District did, they charged the river water which we took out against allotment water that we were paying for and then when we took any additional water they charged that as extra water, didn't they, and charged us a dollar an acre-foot for it?

A. I think I will have to answer you by referring to the actual months, Mr Grambling, if I may. In May, 1951, there were 4.7 acre-feet of allotment water taken from the river.

Q. How much?

A. 4.7. There was 38.3 taken from the Franklin Canal. No other water was charged to the City in that month.

Q. No, but this water is charged on an annual basis not on a monthly basis.

A. I know, but there is no--

Q. But during that year there was water taken--

A. I am trying to answer your question.

Q. But you can't answer it by taking a month where there was no excess.

A. Well, I can give you the other months.

Q. Give me the year, that's what I want.

A. I think I ju t gave you those figures.

Q. But you didn't break it down between allotment water and excess water?

A. Well, I thought I had done so, but I will now do so. In 1950-51 there were 21.5 acre-feet of allotment water taken at the river pumping plant.

Q. All right, just a minute. How did you determine that was allotment water, what characteristics did that water have that made it allotment water?

A. I examined the records and that was the caption on the record, "allotment stored water."

Q. Although it came down the river?

A. Yes. These charges are all in the period of the irrigation season in which the waters at El Paso are a mixture of waters released from storage, waste waters from irrigation canals, and drainage return.

Q. And flood waters?

A. And occasionally flood waters.

Q. Yes. And what they have done there in those figures, in those headings, is to charge all water—as indicated by Mr. Phillips yesterday in his testimony—they have charged all water taken from the river during the irrigation season as allotment water, haven't they?

A. In part, correct, but generally not.

Q. Sir?

A. Your statement is in part correct but equally not.

Q. Well, that means both "yes" and "no" would be your answer to that question?

A. Yes, both "yes" and "no" depending on the year.

Q. Well, depending on the season too?

A. No. I am talking about the irrigation season. In other words, I think in order not to confuse the record, Mr. Grambling, the irrigation season has been given here as March to September. In March, 1951, there was 161 acre-feet of return flow water recorded as having been pumped from the river. There was no allotment water charged as having been pumped from the river until May, then only 4.7; June, 1.6; July, 15.2. And during those three months the only water that was pumped from the Franklin Canal was also classified as allotment water.

Q. Well, Mr. Hill, I would like to ask you another question. The water, I believe, according to the records that you examined last night that you testified to a minute ago on direct, the water which came from the Canutillo wells, the City was charged for that too, wasn't it?

A. The City was charged for the water of the Canutillo wells only to the extent that it was carried through the Franklin Canal.

Q. Well, it was charged a dollar an acre-foot for the water from the Canutillo wells that came from the Franklin Canal?

A. That is correct, but not the Canutillo water that was allowed to run down the river and pumped out.

Q. If it entered into the Franklin Canal it got into the charge area?

A. It got into the charge area. As long as it stayed in the river it did not.

Q. Well, now, there is no label on the water that they charge, they simply enter the charge as they see fit, don't they? How can you tell it is return water? For example, there was evidence here yesterday that they couldn't tell us how much was return

water. Now, when you see a gallon of that water, or a cubic foot, coming down the river, or an acre-foot, how can you tell whether it is return water or whether it is water originally released from the dam or whether it is wild water, or how can you tell? Does it have a different color, or how do they go about that?

A. Well, there have been estimates made for a great many years by a great many different people, but I think the witness that you had on the stand yesterday, Mr. Street, could probably tell you quite accurately.

Q. Mr. Who?

A. Mr. Street, I think, that runs the plant.

Q. Mr. Street?

A. Yes. I think he could tell you quite accurately because the chemical composition of the water changes materially between Caballo Reservoir and El Paso. And the difference of the quality in El Paso and the quality of the drains that contribute to it is one of the measures of how much water passed through the Project and through the soils back into the river.

Q. Now, Mr. Hill, to return to your Exhibit 152 for a minute, the one that is headed "Daily Hydrographs of Flow in Rio Grande at El Paso" for certain years. That is your Exhibit 152, is that right?

A. Yes.

Q. Now, that hydrograph does not cover any period prior to the installation of the Elephant Butte Dam, does it?

A. No, nor any period prior to Caballo Dam.

Q. It only covers after the Caballo Dam was built, is that correct?

A. Yes.

Q. And it shows a reasonably uniform passage of water by the city of El Paso during the irrigation period, doesn't it?

A. Yes, sir.

Q. With the exception of in '38 you had two or three slight floods there and then it breaks off when the irrigation ceases and doesn't come up again until you start irrigating again, does it?

A. No, that is correct and that is one of the bases of estimating the amount of drainage flow in there because the drainage flow continues to come after you close the gates.

Q. Now, I believe you said you had no fault to find with Mr. Lowry's statement that there were 230,000 acre-feet less water flowing by El Paso since the Elephant Butte Project was installed than there was prior to that time, is that correct?

A. I have no quarrel with his calculation of an annual average.

Q. You agree to substantially the same figure?

A. I assume Mr. Lowry has checked his figures and I have no reason to doubt his figures.

Q. Well, your daily hydrograph here would show what took place since '38, and you have a hydrograph prior to that time?

A. Yes.

Q. Which you made for your own convenience?

A. Well, I have one in connection with other matters, such as the present action between Texas and New Mexico. I have hydrographs for all the years.

Q. But you qualified that by saying counsel asked you about it, but you said that is offset by the fact that we have a controlled flow in El Paso and get a better benefit from the water, a more beneficial use than we would if it was running wild, if it was running by uncontrolled, which is true, of course, isn't it?

A. Why, certainly.

Q. That has to be true?

A. Otherwise there would be no justification for building reservoirs.

Q. That gives you a controlled flow, doesn't it?

A. Certainly.

Q. But if the Judge here were trying to find out how much water flowed down the Rio Grande River, regardless of the use that that water might be put to, he would have to come to the conclusion under your testimony, would he not, that 230,000 acre-feet less of water are allowed to flow down the river now than they were before they built the Elephant Butte Dam; you couldn't get away from that, could you?

A. You couldn't get away, if you limit the Judge to the restrictive question to which you limit me, the answer is yes.

Q. And if the City of El Paso was relying upon riparian rights for that water there would be 230,000 acre-feet of water that it would be entitled to receive, is that right?

A. They might be entitled to receive it but they couldn't use it.

Q. They couldn't use it with Elephant Butte up there but they certainly could have used it if you hadn't had Elephant Butte Dam?

A. They couldn't have used floods of the magnitude that I have testified to.

Q. But they certainly could have used this 230,000 acre-feet if you didn't have Elephant Butte Dam controlling it couldn't they?

A. I don't think they could.

Q. How much would you say they could use? Would you think they could use as much as 8,000 acre feet?

A. I would answer you this way, Mr. Grambling. If it were not for Elephant Butte no engineer would attempt to get water from the Rio Grande. It would be violent too much of the time.

Q. In spite of these hydrographs that Mr. Lowry put in showing the volume of water going by there?

A. Not in spite if them, because of them.

Q. You don't think they would try to get any water out of there?

A. Not without storage.

Q. Well, there wouldn't be anything against having some storage like they are building up now up there in Canutillo?

A. Well, that kind of storage would be futile.

Q. It would be futile?

A. Certainly. You might have a hundred or more days in which you would have no water at all.

Q. Well, we are not talking about it being used exclusively as the only water supply, we are talking about it as a supplemental source, like El Paso is using it today. You certainly could get many times—from that flow you could certainly get many times the quantitites of water out of that river as El Paso is taking out, couldn't you?

A. You mean if you built a large reservoir?

Q. I mean if you didn't build any reservoir, if you simply had that treatment plant out there and took the water out as it came down?

A. Mr. Grambling, I am an engineer of some forty years' experience in this field, and I can say to you without any hesitancy at all that no reputable engineer, if faced with the problem of providing a water supply for a major city would rely on a supply characterized by the hydrographs which Mr. Lowry put in, without storage.

Q. Would he rely on it as a supplemental supply?
A. Not except as a last extreme and then only for certain months in the year.
Q. Well, that would protect your well supply, wouldn't it, even if you relied upon it for several months of the year?
A. Well, the costs of getting that water under those circumstances with an uncontrolled river would unquestionably make that supply prohibitive.

Mr. Grambling:
Pass the witness.

On Re-Direct Examination.

Questions by Mr. Edwards:
Q. Mr. Grambling is proceeding on the assumption that the City of El Paso would be the only user under those circumstances, is he not?
A. I can't say what Mr. Grambling has in his mind.

Mr. Edwards:
That is all.

Questions by the Court:
Q. What is the distinction that you make between waste water and drain water?
A. Well, drain water, sir, is water which has been diverted from the river applied to land, percolated either out of canals or percolated from irrigation has returned to drains, that is, open drains in this valley, and flows back through these artificial channels to the river. That water in this particular valley in normal years—not the extreme drouth we have had re-

cently—drains perhaps a minimum of one hundred to two hundred cubic feet per second, up to perhaps double that in the summer time, in the latter part of the irrigation season. Waste water, as the term is used, is water which was diverted into canals, and due to some sudden change in demand—in other words, the use of water changes quite rapidly, if you have a period of thunderstorms the farmer doesn't want the water because it just rained on him, so that water passes through the canal into wasteways, which may or may not discharge in drains, and they discharge separately, most of them do, and that water returns to the river without having been applied to land and it comes down, and if there is a rain in the Mesilla Valley, for example, the farmers will not take what has been ordered, and it takes two or three days for the water to travel from Caballo to El Paso. If the farmers have not used it there, then there is more at El Paso than is needed and it passes on down through the Project and goes to the Hudspeth District under the Contract of 1924, and if it is more than they can use, why, then it goes to somebody else, and eventually passes Fort Quitman. That occurs perhaps half a dozen times or maybe a dozen times each year; sudden drops of temperature, or a storm, or something which will cause water released from Caballo to transit through the Project without having been applied to land, and it appears as a little sudden rise here in El Paso. Then there is a third class of water, which as a result of heavy rainstorms on certain tributary streams, they are all very small, below Caballo, and most of them are fifty miles or more up into New Mexico, the largest one up towards Caballo Dam, with a heavy rain—one, two or maybe three inches—in a few hours, the flood comes down

this arroyo and it may run twice as much water as the normal quantity of water in the river; well, that comes down rapidly and a certain amount of it is customarily used because it is there and they open up the gates, and it is nice fresh water, but it travels through, and on the hydrograph that I testified to a moment ago you see these rises in fairly stable quantities; that's what we call storm waters. So you have your basic classes as the stored water, normally released from the reservoir; then return waters which come from drains; waste waters, which come out of canals and is water that was diverted with intentions of being used but for some reason was not used; and then the non-regulated storm water. And they are all mixed at El Paso.

(Witness excused.)

Mr. Edwards:
The Plaintiff closes.

Mr. Grambling:
The defendant closes.

NICOLAS PEREZ, JR., a witness for the Defendant, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination

Questions by Mr. Grambling:
Q. Mr. Perez, will you state your name to the Court, please?
A. Nicolas Perez, Jr.

Q. And what business or profession are you engaged in, Mr. Perez?

A. I am City Engineer of the City of El Paso.

Q. Are you the same Mr. Perez who testified here at the previous hearing of this case last November?

A. I am.

Q. Mr. Perez, I believe last November you gave testimony with reference to the cost of rebuilding or replacing three bridges across the Franklin Canal in the City of El Paso, one at Piedras Street, one at Verde Street, and one at Copia Street, is that correct?

A. Yes.

Q. At that time you testified the total cost of the three bridges was $51,397.69?

A. That is right.

Q. Did that include any engineering charges?

A. It did not.

Q. Now, Mr. Perez, I will ask you if at my request you have broken down the charges, the cost of the bridge at Piedras Street and likewise the cost of the bridge at Verde Street?

A. I have.

Q. And the cost of the bridge at Copia Street, that's one of the three?

A. That is right.

Q. Now, are you in a position to tell the Court the cost of the bridge which was placed by the City of El Paso across the Franklin Canal at Piedras Street?

A. I am.

Q. Will you tell us what the cost of that bridge was?

A. The total construction cost or total cost?

Q. Well, the construction cost first?

A. I have a figure here on the cost of the bridge at Piedras Street over the Franklin Canal of $20,871.26.

Q. Did that include engineering charges?

A. It does not.

Q. What is the engineering charge—did you assess an engineering charge against that?

A. I did. I assessed a ten percent of the total cost for an additional $2,897.13.

Q. $2,087.00, isn't it?

A. $2,087.13, additional.

Q. What would that make the total cost of the bridge including engineering charges?

A. $22,958.39.

Q. Now, Mr. Perez, with whom—I will ask you this, are you experienced in what the engineering costs are on construction work of this character in this area?

A. I am.

Q. What is the usual and customary charge for engineering charges?

A. Ten percent is a customary, or reasonable charge.

Q. You mean ten percent of the cost?

A. Of the construction cost, yes, sir.

Q. Now, in this instance here, am I right in assuming that the City did not actually pay out to any engineering firm this money?

A. That is correct.

Q. What did they do, simply furnish the engineering service themselves?

A. They furnished the engineering service.

Q. Now, when was the bridge across Piedras Street completed?

A. It was completed (Checks notes)—I don't know when the construction was actually completed but the City Council paid the final estimate to the contractor on the 2nd of April of 1953.

Q. April 2, 1953?

A. Yes, sir.

Q. And had payments been made in some instances prior to that time?

A. There had been.

Q. But that was the final payment, is that correct?

A. That was the final payment, yes, sir.

Q. Now, I will ask you whether or not you are familiar with the cost of the bridge which was constructed by the City or under the direction of the City across the Franklin Canal at Verde Street?

A. I am.

Q. What did that bridge cost?

A. The cost of the bridge at Verde, total construction cost was $15,943.01.

Q. And does that include engineering charges?

A. It does not.

Q. What is the reasonable engineering charge for that bridge?

A. $1,594.30.

Q. What is the total charge including engineering and construction?

A. $17,537.31.

Q. When was the final estimate paid on that bridge, Mr. Perez?

A. It was paid—the final estimate that was paid included the payment on all the bridges.

Q. Oh, yes, but when was it made on Verde Street?

A. The 2nd of April of 1953.

Q. Now, on Copia Street, what was the cost of the bridge across there?

A. The construction cost on the Copia Street bridge was $14,583.42

Q. What is the reasonable charge for engineering services there?

A. $1,458.34.

Q. And what was the total charge on that bill?

A. $16,041.76.

Q. And when was the final estimate paid on that?

A. The same date, the 2nd of April, 1953.

Q. Now, Mr. Perez, are you familiar with those bridges, the nature of their construction?

A. Yes, I am.

Q. And the nature of the traffic that goes across there?

A. Yes.

Q. The use to which the bridges are put?

A. Yes.

Q. In your opinion are those bridges necessary in order to properly accommodate the traffic that goes across there from day to day?

A. Yes, sir.

Q. And is the construction of a practical and economical and feasible nature and design?

A. Yes, sir.

Q. Now, you say you are familiar with the nature of the work that was done there?

A. From plans.

Q. Yes, sir, that is what I mean?

A. Yes.

Q. In your judgment, the costs you enumerated here or have given to the Court, are they reasonable charges in this area, construction charges of those bridges?

A. They are.

Q. In each of them?

A. Yes, sir.

Mr. Grambling:

We pass the witness.

On Cross Examination.

Questions by Mr. Edwards:

Q. Mr. Perez, you testified here last November and when you were asked by Mr. Grambling, or I think it was Mr. Grambling—anyway, counsel for the Defendant—as to the cost of these bridges you gave the figure of $51,397.69 as to the total cost to the City for the three bridges?

A. Total construction cost, yes, sir.

Q. You didn't say anything about construction cost then. You said what it cost the City, didn't you?

A. Yes. That was the figures available at that time.

Q. Yes. Now, what contractor built those bridges for the City?

A. R. E. McKee.

Q. How much was the total that the City of El Paso paid R. E. McKee for building the bridge at Piedras Street?

A. According tomy figures, $20,871.26.

Q. That's what the City paid R. E. McKee for the bridge completed?

A. That is right.

Q. What did the City pay to R. E. McKee, General Contractor, for the bridge at Verde?

A. According to my breakdown, $15,943.01.

Q. And what did the City pay to R. E. McKee, General Contractor, for construction of the bridge at Copia?

A. According to my breakdown they paid $14,583.42.

Q. And you come in now and you want to add on something like five thousand dollars more just to be sure you haven't done yourself any injustice, is that right?

Mr. Grambling:

Your Honor, this witness hasn't offered to add anything. If it is anybody's fault I am the one at fault, not the witness. Mr. Edwards' figure is a little high, it is something less than that, but at any rate, he didn't add anything on. I just asked him the reasonable engineering charges.

The Court:

I understand.

Q. Well, what the City actually paid to R. E. McKee, General Contractor, for building those bridges was $20,871.26 for Piedras Street, $15,943.01 for Verde, and $14,583.42 for the bridge at Copia Street. That is correct, isn't it?

A. Correct.

Q. Now, your salary as an engineer went on just the same whether there were no bridges built or not, is that right?

A. I wasn't here at that time.

Q. You weren't here. Well, whatever City Engineer was here was on a salary basis, wasn't he?

A. I believe that is correct.

Q. By the month?

A. I believe that is correct.

Mr. Edwards:

That is all.

(Witness excused.)

MR. W. F. RESCH, a witness called by the Plaintiffs at the previous hearing, was recalled at this

time by the Defendant, and, first having been duly sworn, testified further as follows:

On Cross Examination.

Questions by Mr. Grambling:

Q. Mr. Resch, will you state your name, please?

A. W. F. Resch.

Q. You are Manager of the Project here at El Paso?

A. The Rio Grande Project.

Q. The Rio Grande Project located at El Paso?

A. Yes, sir.

Q. You testified on the previous trial of this case last November, did you not, Mr. Resch?

A. Yes, sir.

Q. Mr. Resch, you are familiar, are you not, with the bridges that were built by the City of El Paso across the Franklin Canal at Piedras, Verde and Copia Streets back in 1953?

A. Yes, sir.

Q. The District has never paid any part payment—has never repaid any part of the cost of those bridges, have they, to the City?

A. So far as I know, the District has not.

Q. Yes, sir. Now, I will ask you this, did Congress ever appropriate any money to pay for them?

A. No, sir.

Q. Did they refuse to do so?

A. I wouldn't know the answer to that.

Q. Didn't you get a letter for the repayment of the cost of those bridges from the City of El Paso?

A. Yes, sir.

Q. What did you do with that letter?

A. I forwarded that letter to higher offices of the Bureau.

Q. You mean in Washington?.

A. To the Regional Director.

Q. And they took the position, did they not, that under the contract they weren't obligated to pay for anything except maintenance and that maintenance didn't cover reconstruction of bridges?

A. Yes, sir, that is true.

Q. And they refused to make any payment on it?

A. I don't know that they refused to make payment. I haven't seen the refusal.

Q. But they refused to make any recommendation of payment, did they not?

A. I think that is true.

Q. And as far as you know the matter has never even been referred to Congress for action, has it?

A. Not that I know.

Q. Never got out of the District Office. I mean of the Regional Office?

A. I don't know.

Q. But, as far as you know, it never got into Congress, there was no bill introduced in Congress?

A. That is right.

Q. Mr. Resch, are you an engineer? You are an engineer by training, aren't you?

A. Yes, sir.

Q. You are familiar with construction projects, are you not?

A. Yes, sir.

Q. I will ask you whether or not it is customary in figuring the cost of a project to include reasonable engineering fees?

A. Yes, sir.

Q. And I will ask you whether or not a ten percent engineering fee in this area is a reasonable fee, in your opinion?

A. No, sir. It depends on the type of project.

Q. Well, we are talking about a bridge now, like these bridges across these streets, would you say ten percent of the cost of those bridges would be a reasonable enginering fee?

A. Well, what was the total cost?

Q. The total cost, according to the evidence, is $51,397.00.

A. That may be a little high.

Q. Well, what would you say would be a reasonable percentage?

A. Not having designed those three particular bridges I can't answer that.

Q. But your opinion is that ten percent might be a little high?

A. For those particular structures.

Q. Well, would you say eight percent would be high?

A. I wouldn't know unless I went into the design. I think ten percent would be high. That's about all I can say.

Mr. Grambling:

Pass the witness.

On Direct Examination.

Questions by Mr. Edwards.

Q. Mr. Resch, do you know that the City Engineer was on a salary basis?

A. That is my understanding.

Q. So no matter whether there were three bridges or thirty bridges built his salary would go on just the same, would it not?

A. Yes, sir.

Q. You are familiar with the handling of the City's Canutillo well water, I believe, are you not, Mr. Resch.

A. Yes, sir.

Q. Did it have any authority from the United States or the District to use project facilities for the transportation of that well water other than the Contract of August 10, 1949?

A. Do you mean the conveyance of that water in the Franklin Canal or the conveyance through Project facilities through the river?

Q. Well, I mean through Project facilities, through the river and through the Franklin Canal also?

A. Well, the City refused to sign a license for the use of the facilities for conveying that water to the river, and with the exception of the August 10, 1949 contract, I don't know of any other contract in existence that covers the Canutillo well water in the Franklin Canal.

Q. Now, do you know of your own knowledge whether the same charge was made to the City for handling the Canutillo well water as was made for handling water under the contract of August 10, 1949, and under the contract of February 18, 1941, and the contract of December 1, 1944?

Mr. Grambling:

Just a minute, Mr. Resch. Your Honor, if we are going to proceed in an orderly fashion I think we ought to take these subjects up as the Court said, and certainly the testimony we are going into now has

no bearing on bridges, the cost of bridges, or anything of that character. I am very much interested in this testimony but I don't believe this is quite the proper place for it.

Mr. Edwards:

I just thought in the interest of time we'd get through with the other.

Mr. Grambling:

Well, we have to go through it all over again because I have got a lot of questions to ask him myself.

The Court:

I don't know which will save time but let's get through with the bridges first and then come back to this Canutillo water.

Mr. Edwards:

That is all, then, Mr. Resch.

(Witness excused.)

Mr. Grambling:

That concludes our testimony on the bridges.

Mr. Edwards:

We offer no testimony at this time, Your Honor.

The Court:

Very well, then, we will go to the Canutillo water question. You better come back, Mr. Resch.

Mr. Grambling:

Now, what is the question we are going to take up now, the reasonableness of the charges? And on who do you say the burden was on that particular transaction?

The Court:

Well, I think it would be on the Plaintiff?

Mr. Grambling:

You think it would be on the Plaintiff?

The Court:

Yes.

Mr. Grambling:

Thank you.

MR. W. F. RESCH, was thereupon recalled as a witness by the Plaintiffs, and testified further as follows:

On Direct Examination.

Questions by Mr. Edwards:

Mr. Edwards:

Mr. Reporter, will you repeat the last question I asked the witness?

(Reporter reads):

"Q. Now, do you know of your own knowledge whether the same charge was made to the City for handling the Canutillo well water as was made for

handling water under the contract of August 10, 1949, and under the contract of February 18, 1941, and the contract of December 1, 1944?"

A. It is my understanding that the District's charge for the Canutillo well water in the Franklin Canal was at the same rate as provided for waters in the August 10, 1949 contract.

Q. Well, what facilities of the Project were used in the immediate taking of water by the City under the contract of August 10, 1949?

A. Well, any water under the contract of August 10, 1949—

Mr. Grambling:

Would you reword that question?

Q. What Project facilities were used in the immediate taking of water by the City under the contract of August 10, 1949?

A. The American Dam, the American Canal, and Franklin Canal.

Q. Now, what facilities of the Project were used by the City in the delivery and taking of the Canutillo well water?

A. The American Dam, the American Canal, and the Franklin Canal, and the City's river pumping plant.

Mr. Edwards:

That is all.

On Cross Examination.

Questions by Mr. Grambling:

Q. Mr. Resch, the American Dam and the American Canal are not Project facilities, are they?

A. They are quite close to the allied Project facilities, they are almost an integral part of the Project facilities.

Q. Well, they weren't built by the Irrigation District, they were built by the United States Government, weren't they?

A. Yes, sir

Q. They are not a part of the so-called "Project", are they?

A. I would find it quite hard to dis-associate them from the Project.

Q. Well, how did you get the money to pay for the Franklin Canal, that is charged against the farmers, isn't it?

A. Well, the money was originally appropriated by the Congress out of the general treasury funds and they are being repaid by the water users.

Q. Now, the water users are not repaying anything for the cost of the American Dam, are they?

A. No, sir.

Q. They are not repaying anything for the building of the American Canal, are they?

A. No, sir.

Q. Then the American Canal and the American Dam are not being paid for by the water users or by members of the Project, are they?

A. That is correct.

Q. They were not constructed under the authority or direction of the Secretary of the Interior but were constructed under the State Department, were they not?

A. That is true.

Q. Now, Mr. Resch, a question has arisen here with reference to the reasonable charge of transporting this water which comes down from the Canutillo

wells—you are familiar with that water, where the City has been bringing water down from the Canutillo wells?

A. Yes, sir.

Q. And in some instances they put it into the Franklin Canal, don't they?

A. Yes, sir.

Q. And how far, for what distance did they carry it in the Franklin Canal before it reached the point where it was taken out and put into the treatment plant?

A. I will estimate that that distance is approximately a mile and a half or a mile and three-quarters.

Q. Now, they did not use any Project facilities in transporting that water except the Franklin Canal for that mile and a half or mile and three-quarters, did they?

A. Yes, sir.

Q. What did they use?

A. In transporting the water from the wells to the river they used the Vinton River Drain, the Canutillo Lateral Wasteway, and the Vinton River Lateral.

Q. Well, they owned all that land, had free title to all that land that those drains are located on, the City had free title to all that land, didn't they?

A. Well, I don't know. The only thing I know is that those facilities were constructed, some of them as early as 1922, long before the City bought the property.

Q. Well, how far did they use up there, how far is it from the wells to the river?

A. Oh, in the Vinton River Lateral. I think they have two wells that discharge into that. It is quite possible that the use of that lateral is not over several hundred feet.

Q That is a dirt lateral, is it?

A. Well, it is a lateral constructed in the earth, yes, sir.

Q. Well, that is what I mean.

A. And then the Canutillo Lateral Wasteway, I believe that they have one well that discharges into that; they possibly use four or five or six hundred feet of that wasteway.

Q. That is also of dirt, is it not? Constructed in the earth?

A. Yes. And of the Vinton River Drain, they possibly use, oh, perhaps close to half a mile of that. I have some doubt as to that latter figure.

Q. Now, Mr. Resch, you said that you had charged and billed the City, they haven't paid it, I don't believe, but the City had been billed for this water which was transported through the Franklin Canal to the disposal plant on the basis of the August 10, 1949 contract, is that correct?

A. No, sir. We have not billed the City, the Reclamation.

Q. Well, I mean the District has billed the City?

A. The District, yes, sir.

Q. You are fiscal agent for the District?

A. No, sir. It is just the opposite.

Q. They are fiscal agent for you?

A. That is correct.

Q. The District has billed them as your fiscal agent, is that right?

A. That is correct, but under their own state authority.

Q. On the basis of the August 10, 1949 contract, is that right?

A. The Canutillo well water?

Q. That is what I understood you to say?

A. Well, the Canutillo well water is not covered in the 1949 contract, but we have been—I understand that the District has been applying the same rates to the Canutillo well water for comparable waters as enumerated in the 1949 contract for use of Project facilities.

Q. But you have answered my question, and that is that the Canutillo well water is not covered by the August 10, 1949 contract, is it?

A. No, sir.

Q. There wasn't any Canutillo well water when that contract was drawn, was there?

A. No. I think the first well—

Q. All right. Now, Mr. Resch, that contract that you are telling us about is the amount that everybody pays for water, is it not? What is it, a dollar an acre-foot?

A. That is the current excess water charge of the District, yes, sir.

Q. That is what you charge, or, rather what the District charges for you where the water is furnished by the Project facilities, is it not?

A. Well, that is what any farmer in the El Paso County Water Improvement District Number One pays for excess water.

Q. Well, now, this water you furnish the farmer though, is water which—well, you are furnishing the water too, not only the transportation facilities but furnishing the water also, aren't you?

Mr. Edwards:

I think that calls for a conclusion of law. I think the Court takes judicial notice that it isn't the government that owns the water, it is the farmer.

The Court:

Well, I will let him answer the question.

A. May I have the question repeated?

Q. I say, in case of this other water you not only are furnishing transportation but you accumulate the water and furnish it, don't you, it is water stored by you or by the Project?

A. Well, the only water that we have to deliver to the farmers is water from Elephant Butte Reservoir and the return water as developed on the Project, and storm waters that accrue on the river below Caballo Dam.

Q. Now, these waters that you furnish the farmers in most instances originate in Elephant Butte, do they not?

A. Most of them, that is true.

Q. And how far is it from Elephant Butte down to the head of the Franklin Canal?

A. Approximately 132 miles from the American Dam to Elephant Butte Dam by the river.

Q. Now, what did you say the value of the Project facilities was from the head of the Franklin Canal up to the Elephant Butte Dam, just roughly?

A. The value of the facilities?

Q. Yes, the cost of constructing them?

A. Well, the cost of construction of the irrigation facilities, exclusive of the cost of Elephant Butte Dam and Caballo Dam, is $10,556,000.00.

Q. How much would Elephant Butte Dam and Caballo Dam add to it?

A. The cost of Elephant Butte Dam at the current time is $6,000,000.00 and Caballo Dam about $2,200,000.00.

Q. And then the cost of the Project outside of that you say is ten million dollars, roughly speaking?

A. $10,556,000.

Q. That is a total, according to my figures, of about 18 million 7 hundred thousand dollars. Now, what would be the cost of that Franklin Canal from the head of the Canal, where this water enters it from the Canutillo wells, down to this treating plant, that one-half or, rather, one and a half or one and three-fourths miles?

A. I would have to make a rough estimate because—

Q. Well, just give us the best you can.

A. The original cost was perhaps in the vicinity of a hundred thousand dollars from Leon Street back up to the head of the Canal.

Q. Then it would be something less than a hundred thousand dollars, is that right?

A. Approximately.

Q. Now, what would be the cost of these earthen dams and spillways, or laterals, that you have up there that you say they use in getting the water from the wells to the river, just roughly? Would it be as much as five thousand dollars?

A. Oh, making a wild estimate it would be perhaps ten thousand dollars.

Q. Then the facilities that you are using there transporting this water from the head of the Franklin Canal down to where it is spilled into the treating plant is—the cost of that is $110,000.00, is that right, roughly speaking?

A. Roughly speaking.

Q. And the cost of Elephant Butte, Caballo, and the rest of the Project is $18,700,000.00, roughly speaking, is that right? and that is not too rough, is it?

A. You said "the rest of the Project"?

Q. Well, the total cost of the Project?

A. Of the overall irrigation and storage facilities

Q. Yes, sir.

A. Exclusive of power.

Q. $18,700,000.00. Now will you tell us what, in your opinion, assuming that a dollar an acre-foot is a reasonable charge for furnishing the water out of the Elephant Butte Dam and transporting it down here to the farmers in the area of El Paso, or even transporting it all the way from Elephant Butte Dam down to the treating plant, at a dollar an acre-foot, what would you say would be a reasonable charge, Mr. Resch—

A. Well—

Q. Let me finish my question. What would you say would be a reasonable charge for transporting an acre-foot of water in those facilities in the Franklin Canal, a mile and three-fourths in distance which cost $110,000.00?

A. Mr. Grambling, before I answer that question may I back up to that 18 million dollars?

Q. Yes, sir. I would like to get it correct, if you would like to make a change?

A. I don't understand that eighteen million. What is that?

Q. Well, you had six million for Elephant Butte Dam, two million two hundred thousand for Caballo, and I understood ten million for the other?

A. And they add up to eighteen six?

Q. Yes, sir, eighteen and seven

A. All right, eighteen and seven.

Q. All right. Now, what we would like to know, we are trying to find out what is the reasonable charge of using those Project facilities for transporting an acre-foot of water from the mouth of the Franklin Canal, a distance of one and three-fourths

miles, down to the treatment plant. Would you tell us, in your opinion, what that would be, assuming that a dollar an acre-foot is reasonable where you bring it all the way down from Elephant Butte Dam and where you use this eighteen million seven hundred thousand dollars worth of facilities; here we are using $110,000 worth of facilities and transporting it one and three-fourths miles instead of 132 miles; would you tell us what in your judgment would be a reasonable charge for transporting that water an acre-foot that distance in that Canal?

A. Well, on the basis of the water released from Elephant Butte Dam in 1954, around two hundred or two hundred and twenty-five thousand acre-feet, and the total O. & M. cost to the irrigation districts, exclusive of storage and exclusive of construction, it was quite possible that each acre-foot of water released had a value of something in excess of three dollars.

Q. Well, now, I didn't ask you that but I am glad to get that information. But, now, will you tell us what was the value of transporting an acre-foot of water, not when released in Elephant Butte, but that is produced there in the Canutillo wells, what is the reasonable value of transporting that water a mile and three-fourths in that Franklin Canal?

A. Well, I don't know of any way that I could break that down in that short segment of canal, it doesn't make any difference in the District as to location. The farmer at the upper end of the Canal pays just as much as the farmer on the lower end of the Canal, and that is the only basis for evaluation that I know of.

Q. Well, you furnish the water there, though, don't you?

A. Well—

Q. You furnish the water to the farmer that you are talking about?

A. But the farmer is paying this three dollars an acre-foot that I mentioned.

Q. But you furnish the water?

A. We delivered the water that belongs to the land.

Q. But down here the Project doesn't furnish the water, does it, out of those Canutillo wells? The City furnished that, didn't it?

A. The City pays for the development of the wells, yes, sir.

Q. It paid for the production of the water too, didn't they, they pumped the well, got the water out of the ground and put it in the river, didn't they?

A. Yes, sir.

Q. I will ask you if you wouldn't think that ten percent of that dollar an acre-foot would be a reasonable charge for that short distance to transport that water?

A. No, sir. I would not evaluate it in that manner at all.

Q. You wouldn't be willing to testify to evaluate it?

A. No, sir, not in that manner.

Q. Mr. Resch, I believe there has been a shortage of water here in the valley for the last several years, has it not, irrigation water?

A. Yes, sir.

Q. During that period of time one farmer might have a well and not need as much water as another and they have switched water from one water-right land to another, have they not?

A. Yes, sir.

Q. What do you charge for making that transfer of water?

A. We don't charge anything.

Q. You don't charge anything, and many times you move it a whole lot further than this one and three-fourths miles, don't you?

A. No, sir.

Q That Caballo Dam facility was not to be charged against the farmers, that was an appropriation for flood control, wasn't it?

A. Flood control and power development.

Mr. Grambling:

I believe that is all.

On Re-Direct Examination

Questions by Mr. Edwards:

Q. Mr. Resch, Mr. Grambling asked you if you would evaluate a proper charge for transporting an acre-foot of water, Canutillo well water, in a certain manner [illegible] him that you would not evaluate it in that way. In what way would you evaluate it?

A. Well, I think that the method in which the irrigation district assesses its members, wherein each member is assessed according to the rates as established by the District's tax roll, regardless of location on the Canal, be it at the head or be it at the tail end, is a fair approach.

Q. Now, you have stated in response to question by Mr. Grambling that the total cost of the Project facilities, including Elephant Butte and Caballo Dams and all of the installations in connection therewith, and ditches and dams, ran into several million dol-

lars; but, Mr. Resch, who is repaying that to the Government?

A. The farmers of the Irrigation District.

Q. The farmers. And the farmers who are under obligation to repay that to the Government are still charged this dollar an acre-foot for excess water?

A. That is correct.

Q. Now, Mr. Resch, you have seen the City's water treatment plant in the river down there, have you not?

A. Yes, sir.

Q. And is there a lift of the water connected with taking it out of the river bed? By that I mean do they have to pump it up from the bed of the river to a higher elevation or not?

A. Yes, sir. I don't think there is any question about that.

Q. What would you say would be the amount of lift that is necessary in taking the water from the bed of the river?

A. Oh, I would estimate that probably eight or nine feet more than it is by taking it from the Franklin Canal.

Q. All right, and what method of making that lift is used when the City takes it from the river bed?

A. Well, by use of their pumps.

Q. Operated by electricity or what?

A. Electric pumps, yes, sir.

Q. And have you seen the pipes that they have for withdrawing the water from the river bed?

A. Well, I saw them when they were being installed, yes, sir.

Q. Are there any elbows in those pipes?

A. Yes, sir. There are several 90-degree turns.

Q. As an engineer, would you say, what would you say would be the cost of pumping that water out through those 90-degree turns and elevation of ten feet per acre-foot as compared with taking it out of the Franklin Canal at a dollar per acre-foot?

A. I haven't made a direct computation on that, but it would appear that if you consider the increased pumping cost due to the lift over and above what it would be from the Franklin Canal, plus the several hundred feet of pipeline, and the angles, bends, turns; and also considering that they have a big depreciation ratio on those pumps in that river plant on account of the sand that is sucked into the pumps over a period of years—ten or fifteen years it is not improbable but what they will find that the cost per acre-foot would be a dollar or even greater.

Mr. Edwards:
That is all.

On Re-Cross Examination.

Questions by Mr. Grambling:

Q. But you have made no calculations on that and you are just giving us—

A. Giving you an estimate.

Q. Prognosticating, isn't that what you are doing here?

A. Yes, sir.

Q. Kind of thinking out loud?

A. Yes, sir.

Mr. Grambling:
That is all.

Questions by the Court:

Q. Are there some administrative operating expenses that are involved in delivering water to the respective landowners here and there, such as you have mentioned, which would not be involved in delivering water under the contract of August 10, 1949?

A. Yes, sir. The type of service that would be incurred in the delivery of water to farms would be the ditchrider, that would probably be over and above what is involved in the delivery of water to the City's plant. However, offsetting that, particularly in the fall and early winter and early Spring, under the service that has been extended to the City is the requirement to keep two men on the job at the Leon Street Wasteway and the gate tender at the head of the Franklin Canal, who would be used for maintenance work along the Franklin Canal with no service being given to the City. It is necessary to raise the water elevation at the Leon Street check, which is several hundred feet below the City's water treatment plant, so that they can divert water from the Franklin Canal, and in order to maintain a constant watch over that water at that point we have to keep a man on duty there almost continuously under normal water conditions, even in the fall and early spring. During the month of January, of course, there is no water in the Franklin Canal and that service during January is not extended for the benefit of the City.

Q. You say there is no water at all in there in January?

A. No, sir. January is a maintenance month throughout the Project, and during that month the crews are working in the beds of the canals and on the structures, and so forth, and consequently, we do not carry the water through the canal system in January.

Q. And what facilities are used in delivering water under the contract of August 10th in addition to any canals, if canals are used in that respect; I am thinking about drains and wasteways, and other things that would have to do with gathering this return flow, excess waters, and so forth?

A. Your Honor, if I understand the question correctly, the first factor, of course, would be the gathering of the water. The return flow water is spelled out in the 1949 contract, and that water comes from 230 miles, plus or minus, of open gravity type drains that have been constructed above El Paso and through several outlets to the river in the Rincon Valley and in the Mesilla Valley, that is, between Leasburg Dam and El Paso, and several other places; the water is gathered back into the river for further diversion here in El Paso from that 230 miles of constructed drains of the Project. Now, the cost of the drain system of the Project, including an additional 220 miles of drains in the El Paso Valley below the City of El Paso is $3,965,000.

Q. Now, you mean that would put the cost over 20 million?

A. No, sir, that $3,965,000 is included in the eighteen million seven hundred thousand. That is just that one phase of the case. That is the cost of that drainage system and in addition to the initial cost we have an annual operation and maintenance cost on those drains. Now, over a period of perhaps the past ten years a portion of the operation and maintenance expense to the farmers has been about seventy-five thousand dollars year to keep those drains open to keep the water flowing. That is the gathering feature of the return flow. Then, of course, after it reaches El Paso it is available for diversion at the American

Dam into the American Canal and thence to the Franklin Canal. Now, normally, the drains above El Paso, the 230 miles of drains in normal years—and I am discounting this period of drouth—produces about 260,000 acre-feet of water a year, from which about 230,000 acre-feet is developed between Leasburg Dam and the City of El Paso. That 260,000 acre-feet of water a year is a very important factor in building up and supplementing the water supply of the Project. If we did not have that water we would not have a project here of 159,600 acres. We have got to have that developed water to serve as supplemental water in order to meet the original plans of developing for the Project.

The Court:
All right. Any more questions?

Mr. Grambling:
I believe not, Your Honor.

Mr. Edwards:
No, Your Honor.

(Witness excused.)

The Court:
Any more testimony on this subject?

Mr. Edwards:
None from us, Your Honor.

Mr. Grambling:
We will call Mr. Hugg.

HARLAN H. HUGG, a witness for the Defendant, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Grambling:

Q. Mr. Hugg, will you state your name, please?

A. My name is Harlan Howard Hugg.

Q. Are you Manager of the Water Department of the City of El Paso, the Public Service Board, I believe that's what it is called, in the City of El Paso?

A. I am, sir.

Q. And that board has control of the supply of water and in taking care of sewage for the City of El Paso, is that correct?

A. That is right.,

Q. Now, Mr. Hugg, you testified before in this case?

A. Yes, sir.

Q. And you are an engineer by profession, is that right?

A. Yes, sir.

Q. I will ask you if you have had occasion during your engineering experience to determine the reasonable charge of various utility services?

A. At various times, yes, sir.

Q. That is what I mean, at various times?

A. Yes.

Q. I will ask you whether or not—now, this Public Service Board of which you are the General Manager is a Utility, is that correct?

A. That is right.

Q. And you have to determine rates for water to people, is that correct?

A. With assistance of other persons I am.

Q. Now, Mr. Hugg, you have heard the testimony, you are familiar here with the transportation, the amount of Project facilities which are used in transporting water from the mouth of the Franklin Canal down to your treatment plant, are you not?

A. Yes, sir, about a mile and a half or a mile and three-quarters.

Q. Are you familiar with those facilities, have you seen them, been over them from time to time?

A. Yes, sir.

Q. And you have heard the testimony here of Mr. Resch with reference to the cost of the facilities and the Elephant Butte Project here?

A. Yes, sir.

Q. And there is testimony also that under the contract of August 10, 1949 the City is paying for water furnished by the District at a dollar an acre-foot. Are you familiar with that?

A. Yes, sir.

Q. Now, is that for Project water?

A. That is Project water, yes, sir.

Q. That is Project water?

A. Yes, sir.

Q. Now, this water that comes from Canutillo, do you use any other Project facilities except the Franklin Canal for a distance of about a mile and a half?

A. You are talking about the water before we laid our pipelines?

Q. Yes, before you laid your pipelines?

A. There was drainage ditches across the property the City owns up there that the wells pump into and drain down to one corner where there is a box under the dike and into the river and then down the river into the Franklin Canal.

Q. Now, Mr. Hugg, assuming that that dollar an acre-foot is a fair charge for Project water as the price contracted on where the water is delivered by the Project and the District to the City of El Paso using Elephant Butte Dam and other facilities which it has, have you an opinion as to what would be a fair charge for using the Franklin Canal up there to transport water a distance of approximately a mile and a half to a mile and three-quarters?

A. Mr. Grambling. I am kind of like Mr. Resch. I am at a loss as to how to set that figure. I don't feel that anyone, any engineer, could say what that water that was furnished by a person and then transported a mile and a half through a canal would cost or sell for or be a reasonable charge of same as water that was collected by dams and transported 125 miles, with the loss in the transportation, and then spread out through the valley. It would be hard to arrive at what the percentage between the two would be. Ten percent I would think would be, if anything, high on the average of what was required for the two waters. But it is hard to figure any kind of an answer out of that one.

Q. Well, you know whether or not utilities in fixing rates, whether one of the elements they take into consideration is the value of facilities in use?

A. That is right, sir.

Q. And in fixing the reasonable rate do you know whether or not it is the practice to determine a fair return on the investment?

A. That is right.

Q. And you think in this instance that ten percent of the dollar charged, or ten cents, would be certainly a fair charge; if anything, on the high side, is that right?

A. Well, for a mere mile and a half of canal with no dams or dikes, against 125 miles of transportation and collection system, looks like it couldn't be much higher.

Q. What do they do for you in connection with delivery of those waters, what does the Project do for you?

A. How do you mean that?

Q. What labor do they have, what steps do they take?

A. Well, actually, their water is turned into the Franklin Canal, at the All-American Dam and then into the All-American Canal, and it goes by the plant and we take it out at the plant, and it is metered at that point. They come by and check it at various times, take the readings.

Q. How often do they read those meters?

A. About once a month.

Q. Who do the meters belong to?

A. The City of El Paso. Right now, while there hasn't been any water in the river they have closed the gate down below the plant so that water will stand in there, and if any water did trickle through we could get it but there hasn't been any trickling through.

Mr. Grambling:

Pass the witness.

On Cross Examination.

Questions by Mr. Edwards:

Q. Mr. Hugg, you know that the farmer up there just below Caballo Dam pays just the same water charges as the farmer down here at Fabens, don't you?

A. That is right.

Q. Yes.

A. That's what I have understood.

Q. Yes, sir. And one of your customers for your City water service who has got a faucet in his kitchen a block from your water reservoir pays the same rate as one who is five miles out on the edge of town?

A. When we furnish the water, yes, sir.

Q. Now, of course you know that the City of El Paso had no right to use the Franklin Canal for a mile and a half or for a foot and a half without some kind of a contract, don't you?

Mr. Grambling:

That calls for a conclusion on the part of this witness. We are getting into law.

Mr. Edwards:

I think this witness is qualified to answer that question.

The Court:

Well, I will hear his answer.

A. Would you repeat the question?

(Reporter reads):

"Q. Now, of course you know that the City of El Paso had no right to use the Franklin Canal for a mile and a half or for a foot and a half without some kind of a contract, don't you?"

A. I don't know how to answer that question exactly.

Q. You think you have a right to use another man's property without some sort of authorization?

Mr. Grambling:
That is argumentative.

Q. Let me ask you this question, if the City of El Paso didn't take this Canutillo well water through the Franklin Canal and other facilities of the Project under the August 10, 1949 contract, on the same basis then, it had no authority at all to use Project facilities, did it ?

Mr. Brockmoller:
I will object to that as going back and asking the same thing over again, reframing the question in a different fashion.

The Court:
You think you can answer that question?

The Witness:
I don't know whether I can or not. I wasn't working for the City then.

Q. I would like to hear you try it. I think you can.
A. Actually, the Canutillo well water, as far as I know, as far as my experience itself is concerned, was actually never ordered into the Franklin Canal until the letter that I wrote to Mr. Resch at his request when he asked me which I wanted—in the Franklin Canal or in the river—about a month ago, and at that time I wrote him and told him that I wanted it in the Canal. Now, previous to that time there had been verbal arrangements, I understand,

between his man who handles the Franklin Canal and Haskell Street, who handles the treatment plant, as to whether it would be better in the river or the Franklin Canal. It was worked out back and forth between the two of them that were operating the Franklin Canal and operating the treatment plant.

Q. Yes, sir, and in that connection it was your preference whenever possible to get the water from the Franklin Canal rather than from the river bed wasn't it?

A. No. There have been times when we preferred to have it from the river bed because we could put it at the plant in different positions at different points.

Q. Did you ever ask to have it put back in the river?

A. You mean since I wrote the letter?

Q. No. After your man had requested that it be handled through the Franklin Canal, did you ever ask them to put it back in the river?

A. You know, actually I can't answer that because Haskell Street and Mr. Kirby have handled that I have not asked for it personally. I have not asked that it be put in the Franklin Canal either.

Q. But as far as you know nobody has asked that it be put in the river?

A. As far as I know, it's never been asked that it be put anywhere.

Q. That is, you don't know?

A. That is right. The only time I know it's been asked to be put in the Franklin Canal I wrote a letter to Mr. Resch to put it in the Franklin Canal and agreed to pay the charge.

Q. Well, you do know that the control of the valves by which water is taken from the Franklin Canal are over on the City's side, don't you?

A. The control?

Q. Yes, the valves. How do you get water out of the Franklin Canal?

A. It is pumped from the Franklin Canal and it is pumped out of the river.

Q. I am talking about the Franklin Canal now.

A. It is pumped out of the Canal.

Q. Who operates the valves that pump the water out of the Canal, where are the controls?

A. It is under the supervision of Haskell Street and the treatment plant.

Q. On City property?

A. That is right.

Q. Where do you want that water that is supposed to be coming down the river tonight, in the river bed or in the Canal?

Mr. Brockmoller:

I don't see the materiality of that. I think that is a matter that we decided in chambers.

Mr. Edwards:

I would like for it to go in the record.

The Court:

All right.

A. I would like to have it in the Franklin Canal. In the letter that I wrote Mr. Resch I asked him to put it in the Franklin Canal until I advised him differently.

Mr. Edwards:

That is all.

(Witness excused.)

HASKELL R. STREET, a witness for the Defendant; having been first duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Grambling:

Q. State your name, please, sir.

A. Haskell R. Street.

Q. Are you connected with the Public Service Board of the City of El Paso?

A. Yes, sir.

Q. In what capacity?

A. As chemist and superintendent of the water plant and sewage plant.

Q. Is that the water treatment plant we have been talking about, one of them?

A. That's the only water treatment plant which the Public Service Board has, 800 Canal Street.

Q. Mr. Street, you have heard testimony here about the advantage of having the water in the canal from a cost standpoint as against having it in the river. Have you made any calculation as to the cost of pumping from the canal a thousand foot of water--a million gallons of water, I mean?

A. We daily do that on our records to find out the cost in KWH, that is, Kilowatt hours of electricity, for each million gallons of water pumped. Whether we pump that from the Canal or the river, that is a daily chore of the operator, no matter where.

Q. Now, could you give us the cost of pumping the water from the canal for a million gallons?

A. I can give you an average figure.

Q. All right.

A. From the canal the cost is approximately $1.45 per million gallons.

Q. Now, can you give us the same figure pumping from the river?

A. Yes, sir. The cost is approximaaely $1.75 per million gallons.

Q. Then that would be thirty cents per million gallons more expensive to pump from the river than to pump from the canal?

A. Now, that is based on an average cost of one cent per kilowatt for electricity.

Q. Well, that is the cost you are paying now?

A. Yes, sir, it is approximately. Now, your last question. I am sorry, I missed it.

Q. I said that is a difference of thirty cents per million gallons?

A. That is right.

Q. That you save from pumping from the canal rather than from the river?

A. Yes, sir.

Q. And have you worked that out, can you tell us how much that is per acre foot?

A. Well, there are approximately three acre feet to a million gallons so—

Q. 3.07.

A. 3.069, I believe, is the figure usually used. And that would be in round figures approximately ten cents per acre foot.

Q. You would save ten cents per acre foot by pumping this water from the canal rather than from the river?

A. Yes, sir.

Q. You wouldn't save a dollar an acre foot then?

A. No, sir.

Q. Now, there has been some discussion here about the cost of maintenance of pumps and replacement of pumps. Have you a figure there of how much

this has amounted to during the last five years of operation?

A. I don't know how much in a figure but I do know that since the winter of 1949-1950 when that station was erected that we have replaced the bowls of two of the three pumps. That is the only major maintenance that has been done, the replacement of two of the three bowls, I mean, the bowls of two of the three pumps.

Q. And what did that cost?

A. I would say in labor and materials about a thousand dollars.

Q. Is that the only major replacement you have had during the past five years since the plant was built?

A. Yes, sir.

Q. How long have we been taking Canutillo water out of there?

A. I believe the Canutillo wells were first started pumping in 1951: Looks like August 1951 was the first date.

Mr. Grambling (To Reporter):

Would you identify this exhibit for me, please?

(An instrument was then marked for identification as Defendant's Exhibit 77 and was handed to opposing counsel for examination.)

Q. Now, Mr. Street, will you tell us—have you got before you Defendant's Exhibit Number 77?

A. I have a copy of it, yes, sir.

Q. What does this tabulation show?

A. Well, it is a tabulation of the amount of water, arroyo and drain return and Canutillo well water,

that was taken into the system through the Franklin Canal Intake Station.

Q. Now, where did you get that information from?

A. Now, that came from the plant records as tabulated from the river plant and from the canal meters at the water treatment plant.

Q. Now in the year 1950-51 how many acre feet came from the arroyo and drain return?

A. According to my calculations the amount pumped from the Franklin Canal Intake Station, Arroyo and Drain Return water, was 2319.4 acre feet, and Canutillo well water was 166.5 acre feet.

Q. Now, according to your calculations there, how much did the City owe for that year?

A. According to my calculations we pumped 95.9 acre feet of water, which should have been termed "contract water", from the river, so I deducted that from the amount pumped from the Canal and that left an amount of 2390.0 net acre feet to be charged.

Q. Well, this shows that the District had underbilled or undercharged for that year $18.30, did it not, according to your figures?

A. Yes, sir.

Q. If it was billed, assuming that it was billed on the basis of a dollar per acre foot?

A. That is right.

Q. Now, in 1951-52, if they billed on the basis of a dollar per acre-foot does that show how much they were billed for?

A. According to my calculations the bill was $4,355.00.

Q. How much was the amount overcharged according to your figures?

A. According to my calculations, the amount of Arroyo and Drain Return water plus the Canutillo well water, less the amount of contract water pumped from the river station, left 3191.6 net acre feet.

Q. Well, now, just so that everybody can understand, what do you mean by "less contract water"?

A. That is water which the District was obligated to deliver to us at the Canal Station.

Q. On account of the fact that you had water rights on a certain land?

A. That is right.

Q. That is part of that water you pay nine thousand dollars a year for?

A. Some amount with which I am not familiar.

Q. And you deducted that from the water that you took out of the Franklin Canal?

A. Yes, sir.

Q. Now, in 1952-53 how much were you billed for?

A. The amount billed was $3,793.90.

Q. And the amount owed according to your figures?

A. According to my calculations it was $1,901.80.

Q. And the amount overcharged?

A. $1,892.10.

Q. In 1953-54 how much were you billed for?

A. The amount billed was $5,082.90.

Q. And the amount owed according to your figures?

A. That was $4,910.40.

Q. And the amount overcharged was how much?

A. $172.50.

Q. That is all on the basis of one dollar per acre foot?

A. That is right.

Q. That includes Canutillo well water, all Canutillo well water that came in the Canal?

A. That includes all of the Canutillo well water that we were allowed credit for.

Q. And you have credited it wherever you could, as far as you could, you have credited contract water against the water that is taken out of the canal?

A. Yes, sir. That was the premise upon which this was made, that the contract water was first charged against all water pumped from the canal.

Q. And the charges that you paid for contract water allowed you to take it out of the canal, isn't that right?

A. That is right. I might add that the calculations are also based upon the fact that we took all Canutllo and all Arroyo and Drain Water that was possible from the river station.

Mr. Grambling:

We would like to offer in evidence this Exhibit Number 77.

Mr. Edwards:

No objection.

Defendant's Exhibit No. 77 was admitted in evidence and reads in words and figures as follows:

"D-77"

Water taken from Franklin Canal Intake Station at Water Plant including Canutillo well water.

(Year starts Oct. 1, ends Sept. 30)

1950-51	2319.4	acre feet—Arroyo and Drain Return
	116.5	acre feet—Canutillo Well Water
	2485.9	total acre feet @ $1.00 per acre foot
	95.9	less contract water pumped from River
	2390.0	net acre feet @ $1.00 per acre foot
	$2390.00	amount owed
	$2371.70	amount billed
	$ 18.30	amount undercharged
1951-52	1436.2	acre feet—Arroyo and Drain Return
	1934.2	acre feet—Canutillo Well Water
	3370.4	total acre feet @ $1.00 per acre foot
	178.8	less contract water pumped from River
	3191.6	net acre feet @ $1.00 per acre foot
	$3190.60	amount owed
	$4355.00	amount billed
	$1163.40	amount overcharged
1952-53	1330.2	acre feet—Arroyo and Drain Return
	1096.0	acre feet—Canutillo Well Water
	2426.2	total acre feet @ $1.00 per acre foot
	524.4	less contract water taken from River
	1901.8	net acre feet @ $1.00 per acre foot

	$1901.80	amount owed
	$3793.90	amount billed
	$1892.10	amount overcharged
1953-54	783.0	acre feet—Arroyo and Drain Return
	4127.0	acre feet—Canutillo well water
	4910.4	total acre feet @ $1.00 per acre foot
	0.0	less contract water taken from River
	4910.4	net acre feet @ $1.00 per acre foot
	$4910.40	amount owed
	$5082.90	amount billed
	$ 172.50	amount overcharged

Mr. Grambling:

We offer in evidence Exhibit Number 77 with the understanding that we are not sponsoring one dollar per acre foot as being a correct charge. We simply show what the charges would be even if the plaintiff's theory of the case were adopted, and it shows the amount of water that was taken out of the canal, both including the Franklin Canal water and all other water, as I understand, except contract water.

The Witness:

Except contract water from the Canal.

Mr. Grambling:

All right. Pass the witness.

In Cross Examination.

Questions by Mr. Edwards:

Q. You say you first took all the Canutillo well water and storm water from the river?

A. Yes, sir.

Q. And then you pumped some from the Canal?

A. There are some months in which we would pump some water. Canutillo well water and arroyo drain water from the Canal.

Q. And you made an arbitrary split on that, didn't you?

A. Yes, sir.

Q. And in that connection there was a discussion between one of your men and one of the Bureau of Reclamation men and they made an agreement on what that should be, didn't they?

A. I am not familiar with any such agreement.

Q. They are not the figures you got here now?

A. I am not familiar with any such agreement.

Q. Where did you get these figures?

A. They came from my records.

Q. Did you talk with Mr Kirby about how these splits would be made?

A. I talked with him about them, yes, sir.

Mr. Edwards:

That is all for the present. We would like time, however, later, to analyze these figures because we think they are wrong.

The Court:

All right. Let me ask you this, can you tell from the records you have before you what apparently accounted for the discrepancy.

The Witness:

What I have here is a month by month tabulation of all the water in the various categories.

The Court:

Well, take 1952-53. It shows an overcharge of $1892.10, is that right?

The Witness:

Yes, sir. Would you like for me to explain why?

The Court:

Yes, in just a minute. Now, you say there was only 1,901.8 net acre feet taken for that year, deducting the pumped water, is that it?

The Witness:

Yes, sir. That is Arroyo and Drainage Return and Canutillo well water, and that water which was credited to the canal station and not the river pumping station.

The Court:

Are you telling me now what you think accounts for the $1892.10, the amount overcharged, or do you mean to say that you are not able to explain it?

The Witness:

No. I think I can tell you why there is a discrepancy.

The Court:

All right.

The Witness:

The District has prepared a bill based upon the fact that if a portion of the water is taken from the river pumping station and a portion of the water is taken from the canal station then the amount of Canutillo water which came down was divided proportionately between the two stations, and the amount of arroyo and drain water was divided proportionately between the two, and on the water from the river there is no charge. My figures are based upon the fact that we must have a choice of whether we would like to have that water or take Canutillo or arroyo drain water at the river station insofar as possible, and any further water taken would be credited to the canal station where you would have to pay the dollar charge.

The Court:

All right. Any more questions?

On Cross Examination Resumed.

Questions by Mr. Edwards:

Q. You mean to say that you are now exercising the choice as to whether you take it out of the canal or out of the river?

A. I said that this bill, this sheet here, was based upon the fact that we would naturally want the water for which we would have no charge, arroyo and Canutillo water, and for which there was no obligation on your part to deliver in the Canal, we'd rather take that at the river station.

Q. After you asked for this water to be delivered in the Canal you never did ask that it be put in the river bed, did you?

A. It would be difficult to answer that with a "yes" or "no" because there was so many different times over the years when we talked about it.

Q. Well, to your knowledge you never did ask them to put it back in the river bed, did you?

A. I don't recall any time.

Q. No, sir. And now you have come in with these figures here based on that kind of a setup?

A. But if there was water in the river we would pump it from the river.

Q. But when you were taking it out of the Canal you never told them that you wanted to take your entire amount from the river bed, you kept on taking it out of the canal, and now you come in and say that was involuntary, is that the idea?

A. No. Only that if there was water at both places, in the river and in the Canal and we wanted to pump from the river and from the Canal, then we should be able to credit that water for which there would be no charge to the river station and that water for which there would be a charge to the Canal.

Q. But the same volume of water was still in the Canal?

A. Yes. That had nothing to do with the amount of water running in the canal.

Q. And you were still pumping from the Canal?

A. Well, there is no water in the river now.

Q. No, no. I am talking about these figures you got here.

A. We still pumped some water from the canal.

Q. You still pumped from the canal?

A. Yes.

Q. And now you want to say that was involuntary?

A. No, we still pump from the river where we—

Q. But on these figures, you come in, in other words, to claim that the figures are incorrect by saying that you involuntarily took the water from the Canal when you never asked them to put it back in the river bed, isn't that right?

A. No, I haven't made any such statement.

Q. In other words, your position here now is you don't want to be charged for what you pumped out of the Canal while you are pumping out of the river bed at the same time?

A. No, sir. It simply means that by contract you are obligated to deliver a certain amount of the water to the Canal. Any other water that we needed and used and were entitled to when we could get it from the river we did so.

Q. But there were time when you were pumping in both places. That is a fact, isn't it?

A. That is right.

Q. And the result, according to these figures now, is that you didn't want to be charged for the water you were taking from the Canal, isn't that right?

A. Insofar as possible.

Q. Yes.

A. That is right.

Mr. Edwards:

That is all.

On Re-Direct Examination:

Questions by Mr. Grambling:

Q. Mr. Street, isn't the difference due to the fact that you didn't want to be charged twice for contract water—

Mr. Edwards:

He is leading the witness, if the Court please, and we object.

The Court:

I will hear his answer.

Q. —for contract water and that you took the water out of the Canal under the contract. I mean by that water which you had a right to take out of the Canal as far as possible while the District here allocated it on a pro-rata basis and did not take that into consideration; isn't that true?

A. Yes, sir.

Q. Wherever you could charge water which you took out of the Canal to the contract you did so, didn't you?

A. Yes, sir. That is right.

Q. And when it ran out, you didn't have any water charge, then you gave the Canal full credit for all the water you took out of it, did you not?

A. That is right.

Q. And to the extent of the water-right land you had a right to take it out of the Canal without any additional charge?

A. That is right.

Mr. Grambling:

That is all.

On Re-Cross Examination

Questions by Mr. Edwards:

Q. You were never charged a penny for return flow that you pumped out of the river, were you?

A. I believe that is right.

Mr. Edwards:
That is all.

(Witness excused.)

Mr. Grambling:
I believe that is all the testimony we have on the reasonableness of this charge that we were taking up at this time. I think the next issue –

The Court:
Let me see. I think Mr. Edwards said he might want to come back to this subject after he had more time to digest the exhibit.

Mr. Edwards:
Yes, sir.

The Court:
All right. And there is no more on this question at this time?

Mr. Grambling:
That is all I have.

Mr. Edwards:
No more at this time.

Mr. Grambling:
May I ask who is to proceed with the question of the effluent? We are very well pleased but I think since the Plaintiff is not too happy about it they would like to take the lead.

The Court:
I think that would be the proper thing.

Mr. Edwards:

If the Court please, we may or may not stand on the record as it is. I am not sure.

Mr. Grambling:

We will be prepared to go forward, if they decide to stand on the record, we will have some testimony in either event.

The Court:

All right.

At this point a recess was had from 5:00 o'clock P.M. on June 9, 1955, until 9:30 o'clock A.M. on June 10, 1955, at which time proceedings were resumed as follows:

Mr. Scott:

The Plaintiff would like to cross-examine Mr. Street, Your Honor.

The Court:

All right.

HASKELL R. STREET, a witness for the Defendant, having been recalled for further cross-examination, testified as follows:

On Cross-Examination

Questions by Mr. Scott:

Q. Mr. Street, do you have with you a copy of Defendant's Exhibit 77 that was introduced yesterday afternoon?

A. Yes, sir.

Q. This exhibit pertains exclusively, does it not, to water taken by the City from the Franklin Canal?

A. No, sir.

Q. What?

A. No, sir.

Q. Well—

A. I beg your pardon. It does. It is from the Franklin Canal.

Q. That is as to water taken from the Franklin Canal by the City?

A. Yes, sir.

Q. I direct your attention to the tabulation for the year 1951-52. Your first item there is 1436.2 acre feet of arroyo and drain return. Now, that is the total that you say was taken, of that type of water, that was taken from the Franklin Canal?

A. Yes, sir.

Q. Do you have with you the data or figures showing the amount pumped each month during that year?

A. I have a tabulation here that was based upon the plant records which shows the monthly total of that amount of water.

Q. Well, now, can you tell us how much of Arroyo and Drain Return water was pumped monthly, month by month, during the year 1952?

A. Yes, sir. I have for October, 917.9

Q. Nine what?

A. 917.9.

Q. All right, sir. And the next month?

A. November: 518.3.

Q. All right.

A. December: 0.

Q. All right.

A. January: 0.

Q. All right.

A. February: 0.
Q. Zero?
A. Yes, sir.
Q. All right.
A. March: 0.
Q. All right.
A. April: 0.
Q. All right.
A. May: 0. June: 0.
Q. All right.
A. July: 0. August: 0. September: 0.
Q. Was any water pumped in the month of December?
A. Any water at all?
Q. Yes, sir?
A. Yes, sir.
Q. Now, what kind of water was that, where did you get it from?
A. We pumped from the river pumping station, not from the Franklin Canal, 733.3 acre feet of drainage and arroyo return water.
Q. Seven hundred and what?
A. 733.3.
Q. Now, what do your records show, Mr. Street, with reference to the pumping of Canutillo well water from the Canal month by month?
A. From the Canal?
Q. Yes, sir?
A. For October, for Canutillo water from the Canal: zero. For November: 0. For December: 0. For January of '52: 0. February: 0. March: 0. April: 0. May: 0. June: 0. July: 449.5. August: 862.6 acre feet. And September: 564.2 acre feet. For a total of 1,934.2 for the year.

Q. During that period of time, those same months, was any Canutillo well water pumped from the river?

A. Yes, sir.

Q. Will you give us that amount, month by month?

A. October: 0. November: 0. December: 0. January: 0. February: 0. March: 0. April: 0. May: 0. June: 0. July: 29.1.

Q. Twenty-nine what?

A. 29.1. August: 14.0. September: 0.

Q. I show you Defendant's Exhibit No. 29, and that shows the percentage of water from the river, taken from the river. Doesn't that show that for the month of December, 1951, you got nothing from the river? (Indicating.)

A. That is what this one shows.

Q. And you just testified that you got 733 acre feet from the river. This was your exhibit and you identified that at the hearing last November, didn't you?

A. Yes, sir. That's my figures.

Q. Those are your figures?

A. That is right, sir.

Q. In other words, you personally prepared, wrote all of the figures that are shown on Defendant's Exhibit 29?

A. That is right, sir.

Q. Now, looking at your Exhibit 77, isn't it a fact that 733.3 feet should be added to your figure of 1436.2 feet?

A. I couldn't say now. I would have to go check my plant records.

Q. Well, which is correct, Mr. Street, your own figures which you say you prepared last November, or this exhibit that you identified yesterday and said was correct? They both can't be correct, can they?

A. No sir. I would have to check my plant records to be sure of that.

Q. Well, which one do you think is correct, you don't know?

A. I think this one is (indicating).

Q. You think this one is?

A. Yes.

Q. You are talking about Exhibit 77?

A. Yes, sir.

Q. Then shouldn't 733.3 feet be added to that 1436.2 because you just testified that you took 733.3 acre feet of water out of the river?

A. I don't think that would be added to this one though.

Q. Where would you credit it, where would you debit yourself with that much additional water, where would you put it, in the next item there? That is not Canutillo well water?

A. Exhibit 77 attempts to show only that water [illegible] Canal and not from the river.

Q. But, nevertheless, you got 733 additional acre feet than what is shown here? (Indicating.)

A. No, sir. Not for the month of December or for the year of 1951-52.

Q. When did you get it?

A. We took that from the river, not from the Canal.

Q. But you did get 733 acre feet more water than is shown on this exhibit?

A. On Exhibit 77?

Q. Yes, sir, 77.

A. We got that much into the plant in addition to what is shown here but it came from the river station and not from the Canal station.

Q. Well, then, are you now denying the correctness of your exhibit, D-29, that was offered last November, showing that you got no water from the river during the month of December, 1951?

A. In that item, yes, sir.

Q. Look at your figures there for the month of September, 1952. How much water did you pump from the canal and from the river?

A. In September, 1952?

Q. Yes, sir?

A. This record shows 564.2 acre feet from the canal.

Q. Nothing from the river?

A. That is right, sir.

Q. Fifty-two what?

A. 564.2.

Q. That was your total for the month of September, 1952?

A. That is right, sir.

Q. Was that all Canutillo well water?

A. Yes, sir. According to this record.

Q. Now, if I understand your testimony that you have just given correctly, you say that in the month of September, 1952, the City took 564.2 acre feet of water from the Canal and none from the river?

A. That is what this record shows here.

Q. I again show you Defendant's Exhibit 29 and ask you if that doesn't show that in the month of September of that same year you took 227.3 acre feet out of the river and 931.5 acre feet out of the Canal? (Indicating.)

A. That's what those figures show, yes, sir.

Q. Yes, sir. So there is a difference of 704.2 acre feet pumped from the Canal according to Exhibit D-29 and Exhibit D-77?

The Court:
D what?

Mr. Scott:
D-77.

Q. Your testimony shows in connection with Exhibit 77 that there were 564.2 acre feet taken from the Canal while your exhibit D-29 shows 931.5 feet total taken from the Canal. Now, when you subtract those differences that leaves 704.2 acre feet that you haven't shown or accounted for in your Exhibit 77?

A. I haven't made the subtraction but it leaves a difference.

Q. You now deny the correctness of at least two of the tabulations shown in this Exhibit D-29, is that right?

A. I haven't denied the second one. I only said that the first instance brought out that this one is correct.

Q. Well, is this first one correct, then? Is this one you show in D-29 correct?

A. I would hesitate to say now without checking my records.

Q. Well, it is either correct or incorrect, isn't it?

A. Unless I go check my records at the plant—

Q. Well, it is either one or the other? It is right or wrong?

A. That is right.

Q. And you don't know whether it is incorrect, right or wrong?

A. I wouldn't want to say which one.

Q. All right. And would you at this time want to say that all of these figures on this exhibit are right or wrong? (Indicating.) I am talking about D-29.

A. It would be difficult for me to say that all of them are correct.

Q. It would be very difficult for you to say that all of them are correct. Well, didn't you say when you testified last November that you compiled and made up this exhibit from your own plant records?

A. That is right, sir.

Q. Yes, sir. And so you considered it correct at that time, didn't you?

A. I said that to the best of my knowledge it was correct.

Q. And you offered it as an exhibit in this Court as being a true and correct statement of what the records of your water plant showed, didn't you?

A. Yes, sir.

Q. Yes, sir. Look at your records for the month of June, 1952 and tell us how much water you pumped during that month and where it came from.

A. This record which is not Exhibit 77 but upon which this Exhibit 77 is based shows that in June 1952: 178.8 acre feet of contract water from the river, 860.7 contract water from the Canal. No other water of any type.

Q. Now, it hasn't been but a few minutes ago when you testified that during the month of June you didn't get or do any pumping at all from either the Franklin Canal or the river?

Mr. Grambling:

That was December. You gentlemen are all wrong about that. There's never been any month of June mentioned up until this moment.

Q. Canutillo well water. I beg your pardon. Canutillo well water and drain return, beg your pardon.

During the month of June you did not pump any Canutillo well water or drain return water but it was all contract water?

A. That is right, sir.

Q. And why do you deduct that 178.8 acre feet?

A. The basis for a deduction there is that the obligation of the District to deliver the water, contract water, to the Canal headgates would entitle us to deduct that contract water, that water which we call contract water, pumped from the river station.

Q. Well, don't you know that you were not charged a dollar an acre foot for that 178.8 acre feet?

A. That is right, sir.

Q. Then why did you deduct it?

A. In order to reduce the amount of water for which we were charged a dollar an acre foot.

Q. Well, you weren't charged anything for the delivery of that 178.8 acre feet, were you, Mr. Street?

A. No, sir.

Q. So then, why do you deduct it? Just because you want to?

A. Because in the course of the year it becomes necessary to pump arroyo and drain water or Canutillo water from the Canal station and at the same time we had taken contract water from the river facilities.

Q. So in the month of June you arbitrarily said that you would deduct that much money because later on you were going to pump some other water for which you would be charged and you didn't know when or how much?

A. Well, we had already pumped some of that type of water earlier in the year.

Q. Look at your records for the year 52-53 and tell us month by month the amount of Canutillo well water pumped.

A. I can give it to you in two different amounts, one from the river and that from the Canal station but not as a total.

Q. All right, give it to us that way.

A. From the river, in January—wait a minute—in October, 1951—

Q. We are talking about 52-53.

A. 52-53. In October, '52: 195.1 acre feet. November—

Q. Where is that from?

A. That is from the river. And all of these figures would be from the river.

Q. Wait just a minute. What was that figure again?

A. 195.1.

Q. And all of these figures now will be from the river until you tell us from the canal?

A. That is right, sir.

Q. All right?

A. November: 0. December: 0. January '53: 0. February: 0. March: 0. April: 0. May: 273.3. June: 59.6. July: 296.1. August: 502.3. September: 727.4. And from the Canal for the same period: October '52: 0. November: 0. December: 0. January: 0. February: 0. March: 0. April: 0. May: 0. June: 195.7. July: 451.5. August: 346.1. September: 102.7.

Q. Mr. Street, please repeat your September figures again, both the river and the canal.

A. In 1953?

Q. Yes.

A. For Canutillo well water—

Q. Both the river and the canal.

A. 727.4 from the river. 102.7 from the Canal.

Q. Making a total of 830.1?

A. Yes, sir.

Q. Did the City take any other water in September, 1953?

A. Yes, sir. These figures show 17 feet of contract water from the Canal and 310.9 arroyo and drain return water from the Canal.

Q. Give us those figures again, please, not so fast.

A. The amount of contract water was 17.0 from the Canal, and 310.9 arroyo and drain return water from the Canal.

Q. Any of those last waters that you mentioned taken from the river?

A. The figure 727.4 acre feet of water, of Canutillo water from the river, all the rest from the Canal.

Q. I mean the last waters that you were talking about?

A. No. Those were from the Canal.

Mr. Grambling:

Your Honor, it seems like there is going to be a lot of delay if we are going to calculate this testimony as we go along. Seems we ought to have an adding machine to do it more speedily. I can put some other witnesses while they are doing that.

Mr. Scott:

You can't make the calculations, Your Honor, except as the evidence develops. We are doing it as speedily as we can.

Mr. Grambling:

It is just delaying the hearing while they make the calculations.

The Court:

Maybe it won't take so long. I can appreciate this testimony makes this necessary.

Mr. Grambling:

Your Honor, this is a very important lawsuit and all we are talking about here is the accuracy of the thirty-one hundred dollar difference. That is all we are talking about here.

Q. Mr. Street, again looking at your Exhibit D-29, it shows that in the month of September you took a total of 72.7 acre feet from the river, 662.2 feet from the Canal. That is correct, isn't it? (Indicating.)

A. That is what those figures show.

Q. Yes. From your testimony that you have just given it shows that you took more than seven hundred feet from the river as compared with 72.7 in your exhibit D-29, and that you took 430 from the Canal as against 662.2 acre feet which exhibit 29 says you took from the Canal. That is correct, isn't it? I am talking about what your testimony and what the exhibit show?

A. That exhibit shows 72.7 and this shows 727 from the river.

Q. All right. And you have just testified that you took 430.6 acre feet from the Canal but Exhibit D-29 shows you took 662. That is correct, isn't it, what your exhibit shows?

A. Yes, sir.

Q. You think it would be a fair summary, Mr Street, to say that to the extent that you have testified to in D-29 it is correct and as to D-77 it is erroneous?

A. No, sir. I wouldn't.

Q. Well, they both can't be right, can they?
A. No, sir.

Mr. Scott:
That is all.

Mr. Grambling:
That's all, Mr. Street.

(Witness excused.)

The Court:
Now, would Plaintiff's counsel like to present evidence in connection with the affluent?

Mr. Edwards:
We have no testimony at this time.

Mr. Grambling:
We will call Mr. Lowry Mr. Lowry, will you come around, please?

ROBERT L. LOWRY, a witness for the Defendant, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Grambling:
Q. Will you state your name to the Court, please?
A. Robert L. Lowry.
Q. And are you a Consulting Water Engineer?
A. Yes, sir.
Q. You testified and gave your qualifications previously in this case?

A. Yes, sir.

Q. Mr. Lowry, I hand you herewith a tabulation which is headed "Figures in acre feet—Discharge of Riverside Canal at Riverside Heading". Do you have that in your hand?

A. Yes, sir.

Mr. Grambling:

We would like to have that identified and given an exhibit number.

(The instrument was then marked for identification as Defendant's Exhibit Number 78 and was shown to opposing counsel for examination.)

Q. It has been identified as Defendant's Exhibit 78. Now, Mr. Lowry, was this exhibit prepared by you?

A. Yes, sir. I copied these figures—

Q. Well, I am going to get to that in a minute. Was it prepared by you?

A. Yes, sir.

Q. Where did you get the information that is shown on this exhibit?

A. I copied it from the records in the Bureau of Reclamation Office in El Paso.

Q. Now, will you tell us in your own language what this shows?

A. It shows the month by month discharge that was diverted into the Riverside Canal from the river for this period from 1939 down through 1954.

Q. At what point?

A. That is at the head of the Riverside Canal, so-called Riverside Heading.

The Court:

Let me just interrupt there. When you say "discharge" does that mean the same as 'intake"?

The Witness:

Yes, sir. That is the term covering the amount of water that was diverted.

The Court:

Well that was taken into the Canal?

The Witness:

Yes, sir.

The Court:

Is that what you mean?

The Witness:

Yes, sir.

The Court:

Out of the river?

The Witness:

Yes, sir. This is the amount in acre feet that was taken during the month.

The Court:

All right.

Q Now, this covers what years?
A It starts with 1939 and continues through 1954
Q And does it have it month by month?
A Yes, sir.

Q. Now, what does it show with reference to the month of January, I don't mean each month, but just generally what does it show?

A. Well, ordinarily the canal is dry. There was no water diverted.

Q. Now, this next to the last line shows the total amount during the month of January for that 16-year period, doesn't it?

A. That is right. That is just a total for that column of figures.

Q. And the last column shows the average amount per month during those sixteen years, is that right?

A. That is right.

Q. Then in February it shows the same information, doesn't it?

A. Same kind of information, yes, sir.

Q. Now, we have here an average mean discharge at that Riverside Heading, that is the river water that you are talking about?

A. Yes, sir. That's the only place this water can come from.

Q. It came to that Riverside Heading?

A. It was at that point, yes, sir.

Q. Now, do these quantities include the effluent also?

A. Yes, sir. The effluent enters the river above this point.

Q. Now, the mean amount there at the Riverside Heading in acre feet for the month of February is how much?

A. 5085.9.

Q. Now, if you want to convert that figure to gallons how would you do it?

A. Well, there are about 325,000 gallons in an acre foot. You multiply that by your 5085.9 to give you

total gallons, and if you wanted that in terms of days, why, you would divide it by the number of days in the month.

Q. Well, have you taken time: could you tell us roughly how many gallons 5085.9 acre feet are?

A. About one and a half billion, if I have my decimal place right.

The Court:

One and a half billion?

The Witness:

That is right.

Q. That would be approximately fifty-four million gallons per day?

A. Something on that order.

Q. Then you come down to March and you got a mean flow of how much?

A. Of about 21066.7.

Q. And April?

A. 31038.5.

Q. May?

A. [illegible]

Q. June?

A. 29823.5.

Q. July?

A. 34631.6.

Q. August?

A. 35897.3.

Q. September?

A. 23940.8.

Q. October?

A. 11577.2.

Q. November?

A. 7557.5.

Q. And December?

A. 5790.6.

Q. And what is the mean average during that period?

A. For the 16-year period, 232216.9.

Q. Per year?

A. Per year.

Q. That is in acre feet?

A. That is right.

Q. Now, does all that water you got set out on this tabulation pass by where the effluent dumps into the river?

A. Well, all of this, the effluent is included in this. All of this has to pass that point upstream with the exception of the effluent which is added at the point of the outfall.

Q. Well, then, all of this water, except the effluent, passes by the point where the effluent is placed into the stream, is that right?

A. That is correct.

Q. And then the effluent moves along with the rest of the water and constitutes this total volume which you have shown here?

A. That is right.

Q. Which reaches—according to the United States Bureau of Reclamation this amount of water reaches the Riverside Heading during the times herein set out?

A. Yes, sir. And that much is diverted.

Q. From the Riverside Heading?

A. Yes, sir.

Q. How many acre feet are diverted from the Riverside Heading, do you know, of water from the Riverside Heading by the Project?

A. I am not familiar with that figure from actual experience but I think the previous testimony indicates that about half of all the lands that they serve in the District below El Paso are served from that heading.

Mr. Grambling:

We would like to offer in evidence at this time Defendant's Exhibit No. 78. Is it received, Your Honor?

The Court:

Yes.

Defendant's Exhibit 78, being received in evidence, reads as copied on the following page:

"D-78".

(Figures in acre feet).

Discharge of Riverside Canal at Riverside Heading Copied from U.S.B.R. 6-7-55

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Year
1939	0	8110	21950	34210	30160	35880	38210	37480	30730	19720	14650	11090	282190
40	0	7680	24840	34940	29220	37880	43010	39880	26160	12260	7010	6280	269160
41	476	3370	13960	40160	33800	34740	44440	47440	29860	14870	12570	8070	283756
42	0	29650	37260	43690	42540	44670	54100	53980	49420	33160	12090	11100	411460
43	0	2680	33240	48000	50610	51220	46720	54240	37680	18690	12580	9650	365310
44	0	5130	26270	44010	36510	37050	43210	46710	37650	20440	12010	7490	316480
1945	0	7540	28110	38790	34380	33780	40810	42700	30179	9660	7460	6320	281720
46	0	6140	20710	34310	31490	26230	34770	43210	22220	11240	7620	4080	242020
47	0	790	19730	35100	21680	32490	35990	32280	16930	6680	6500	2750	210920
48	0	480	15170	28710	22680	33580	40720	35100	17920	10110	5210	6980	216660
49	0	620	19830	30050	26310	30080	37820	37540	24910	14580	11480	7450	240670
1950	0	3240	29340	33540	26820	28580	31520	31970	21140	6060	4830	3110	220150
51	0	2820	16210	16780	5080	12730	20280	21460	7310	2260	2650	2440	110020
52	54	1390	5000	11260	12480	20550	24070	26200	17380	1780	2340	1120	124124
53	0	504	22512	14776	6003	14397	17311	20144	12580	1516	1700	1710	113153
54	258	730	2936	8291	2567	3320	1126	4024	994	2210	221	1010	27687
Totals	788	81374	337068	496617	412130	477177	554107	574358	383054	185236	120921	92650	3715480
Mean	49.2	5085.9	21066.7	31038.5	25758.1	29823.5	34631.6	35897.3	23940.8	11577.2	7557.5	5790.6	232216.9

Mr. Grambling:

I would like to have this next exhibit identified.

(At this point an instrument was marked for identification as Defendant's Exhibit Number 79 and was handed to opposing counsel for examination.)

Q. Now, Mr. Lowry, have you in your hands Defendant's Exhibit 79?

A. Yes, sir.

Q. What is that exhibit, that tabulation, what does it consist of?

A. It is a tabulation showing the amount of effluent from the El Paso Sewage Outfall that was returned to the river from the sewage plant.

Q. For what period of time?

A. That also is for the period from 1939 through 1954.

Q. Does it show it month by month?

A. It shows it month by month in terms of acre feet.

Q. Is that figure down at the bottom the average amount of effluent for the month?

A. Yes, sir. That is the average for this 16-year period.

Q. What was it in January?

A. 828 acre feet.

Q. How about the month of February?

A. 771.

Q. Go ahead and tell me the rest.

A. March was 853. April was 814. May was 880. June was 933. July was 1,012. August was 998. September was 941. October, 951. November, 884. December, 866.

Q. Now, what is that figure, is that average in acre feet?

A. Per each month.

Q. And then the next column over there (indicating), is that the annual amount for each year?

A. That is the total amount that was returned to the river each year.

Q. And what was the average acre foot per year?

A. The average for the 16-year period was 10,731.

Q. Now the last column, is that reduced to millions of gallons per day?

A. That is this annual quantity in terms; just as an average rate for the year it would be millions of gallons per day.

Q. And that was how much? Just tell us briefly what it is.

A. Well, it starts out with 5.9 millions of gallons a day, and then wound up in 1954 with 12.8 million gallons a day showing an average through the period of about 9.5 million gallons.

Q. That is the gallons of effluent that have been placed into the river by the City during the time shown on this schedule?

A. That is right, as measured at the outfall from the sewage plant.

Q. Did the City have a meter there, or do they?

A. I understand they do.

Mr. Grambling:

We offer in evidence this Exhibit 79.

A. Mr. Grambling?

Q. Yes, sir?

A. I would like to call attention to the fact that the last three years in this exhibit differ from a

similar exhibit that was introduced earlier because I have obtained later records for these last three years.

Q. The first exhibit was an estimate and these are actual figures?

A. These are better figures that were submitted by the Hydrographic Section of the International Boundary and Water Commission which makes up the figures for these, and these are the latter figures.

Mr. Grambling:
I offer in evidence at this time Defendant's Exhibit 79.

Mr. Edwards:
No objection.

The Court:
All right.

Defendant's Exhibit No. 79, being records of "El Paso Sewage Outfall", was thereupon received in evidence by the Court, and same is copied on the page following:

"D-79".

El Paso Sewage Outfall

(in Acre Feet)

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Annual	Millions Gallons Per Day
1939	513	517	613	636	583	601	614	562	483	495	504	506	6,627	5.9
1940	565	515	534	515	525	547	567	558	537	560	524	545	6,492	5.8
1941	627	618	708	748	798	808	899	766	704	766	714	715	8,871	7.9
1942	862	852	869	936	964	1,005	1,039	981	926	944	906	917	11,201	9.9
1943	669	611	727	737	816	875	988	979	902	816	829	795	9,744	8.6
1944	780	712	847	859	951	1,019	1,151	1,139	1,050	1,019	914	908	11,349	10.1
1945	898	774	872	848	973	1,019	1,083	1,101	1,055	1,114	979	905	11,621	10.3
1946	887	795	869	777	904	969	1,020	996	937	945	945	847	10,891	9.7
1947	830	755	832	712	821	855	928	908	852	884	807	832	10,016	8.9
1948	795	755	792	697	776	872	955	893	835	921	847	810	9,948	8.8
1949	875	783	856	773	804	899	1,044	1,047	960	954	865	838	10,698	9.5
1950	911	829	945	845	937	975	1,058	1,076	1,015	1,086	1,000	967	11,644	10.3
1951	979	908	1,007	865	973	954	1,130	1,163	1,169	1,142	1,028	1,074	12,392	11.0
1952	1,030	1,020	1,060	976	1,040	1,070	1,120	1,120	1,080	1,120	991	930	12,557	11.1
1953*	976	887	988	985	976	1,194	1,243	1,326	1,246	1,209	1,123	1,126	13,279	11.8
1954*	1,059	1,007	1,132	1,123	1,234	1,271	1,356	1,350	1,310	1,246	1,166	1,142	14,396	12.8
Mean	828	771	853	814	880	933	1,012	998	941	951	884	886	10,731	9.5

* Not adjusted for Irrigation Water used on 120 acres.

(At this point another instrument was marked for identification as Defendant's Exhibit No. 80 and was handed to opposing counsel for examination.)

Q. Mr. Lowry, you have before you an exhibit which has been identified as Defendant's Exhibit Number 80. Was this exhibit prepared by you?

A. Yes, sir.

Q. Where did you get the information contained on this exhibit?

A. All of the figures shown in this exhibit except the next to the last column which shows "Riverside Heading" were taken from the records that are published by the International Boundary and Water Commission. The figures for the Riverside Heading are rounded off from the figures that are shown in Exhibit 78 which I just had.

Q. Now, Mr. Lowry, what does exhibit purport to show?

A. It shows more or less the pattern of operation of the river through the El Paso District or through the El Paso region; what I am saying, not in reference to any designated District but through this area here, where the water is taken in and first measured at this point as it reaches El Paso above the American Dam, and then how it splits up and is taken for different purposes and goes to different places as it goes downstream ending up at the Island Station which is some twenty-seven miles, I think below El Paso, approximately.

Q. Now, what does this first column show—well, I will ask you first, what years does this exhibit cover?

A. This exhibit covers the period from 1939 through 1954.

Q. Now, the first column says "Rio Grande at El Paso". What does that purport to contain?

A. That is the flow as it reached El Paso at the gauge which is just Northwest of town here.

Q. Tell us where it is. We want to know the exact point.

A. I think the gauge is attached to the old Courchesne Bridge. It crosses the river, I don't remember the exact distance, about two or three miles.

Q. Is that blow the American Dam?

A. No, it is above the American Dam.

Q. Above the American Dam?

A. That is right.

Q. We are talking about water that goes down the river, this has no bearing on the Franklin Canal, is that right?

A. No, sir. This water is at the river at that point. There is only one channel there.

Q. This figure of 511,600 what is that, in acre feet?

A. Yes, sir, that is acre feet.

Q. And is that the total amount of water that flowed down by this measuring station at Courchesne Bridge above the American Dam during the year 1939?

A. That is what the record shows.

Q. And then the rest of these figures in that column are just for the years opposite that figure, is that right?

A. That is right.

Q. For 1954 it shows only 96,500 acre feet passing at that point, is that correct?

A. That is correct.

Q. Now, the next column says "Below American Dam". Tell us at what point that was measured?

A. That is at the gauging station in the river in the main channel down below the American Dam.

Q. What purpose does the American Dam serve? Is that across the river or what?

A. That is a dam wholly in the United States across the river just upstream from the border between the United States and Mexico and it serves the purpose of dividing the water turning that part which is not released down the stream for some purpose into the American Canal where it can remain wholly on American Land.

Q. And you show under that column "Below American Dam", 98,700 acres, is that right?

A. 98,700 acre-feet, that is right.

Q. For the entire year 1939?

A. That is right.

Q. Then you show in the American Canal how much?

A. 412,800.

Q. And then, what is this "Acequia Madre"?

A. The Acequia Madre is the canal on the Mexican side which has a treaty allotment for water delivered from El Paso from the Rio Grande.

Q. Sixty thousand acre feet?

A. Sixty thousand acre feet per year is the allotment.

Q. Then "Juarez" over here (indicating), what is that?

A. That is the next station down the stream.

Q. Is that on the American side.

A. No, sir. This is a station which measures the river, which is a part of the International boundary, and it is down just east of El Paso or just downstream from it.

Q. Then does this column "Juarez" show the volume of water that passed by that measuring station?

A. This shows the amount of water that passed that station during the year.

Q. That is what I mean, during the year, and that measuring station is it located close to the effluent outfall?

A. As I understand it, this measuring station is just downstream from the outfall from the El Paso sewage plant.

Q. A distance of a few hundred feet?

A. Well, it may be a few hundred yards, a short distance downstream.

Q. And that shows for the year 1939 how many acre-feet went by that station?

A. 303,900.

Q. And then the Acequia Madre got how much?

A. It got its 60,600 in 1939.

Q. Now, the Riversde Heading, what does that show?

A. Well, that shows that out of this water that was passing the Juarez station they diverted 282,200 acre-feet.

Q. They did what?

A. They diverted into the Riverside Canal 282,200.

Q. Diverted where?

A. That was diverted at the Riverside Heading into the Riverside Canal.

Q. In other words, that volume of water reached that point, didn't it?

A. That is right.

Q. Now, have you got before you Exhibit 78?

A. Yes, sir.

Q. Will you look at the last column?

A Yes, sir.

Q. Now, is the last column of Exhibit 78 supposed to be the same as the water in the "Riverside Heading" under this next to the last column of this exhibit? (Indicating.)

A. It is the same with the last two figures rounded out.

Q. You rounded it out in this Exhibit 80?

A. 80, but they were copied off of the records of the Bureau of Reclamation for the exhibit 78.

Q. Now, this Island Station, what is that, where is that Island Station located?

A. About ten miles downstream from the Riverside Heading.

Q. Well, now, that shows the water—is that the Island Station or what?

A. It is called the Island Station. That is just a name for a station, but it is on the river just like the Juarez station and the El Paso station. It measures the flow that passes that point. It is down below the Riverside Heading.

Q. That is below the Riverside Heading?

A. It is the next gauge."

Q. What is the purpose of putting it in your exhibit?

A. It describes one of two things, that all of the water that passed in the Riverside Heading was not diverted or that there is inflow in the river that picks up below that point, one or the other.

Q. Now then, each year—I won't go through the other years, but each year you have done the same thing that you tell us here?

A. That is right.

Q. And this next to the last column there shows the amount of water going down the river which reaches the Riverside Heading, is that right?

A. Yes, sir. At least that much reached there because that much was diverted.

Q. In other words, there was other water—I was going to ask you about that—that wasn't diverted, is that right?

A. There may have been other water there. There was, and what happened to it in there I am not prepared to say.

Q. Well, would you say that at least that amount of water passed by where the effluent enters there, that includes the effluent, doesn't it?

A. This figure of the diversions at the Riverside Heading, the effluent is already in there.

Q. And the only thing that was added to it is the effluent at the point of output, is that right?

A. That is added in and it is included also in this figure for the Juarez station, which is just below the sewage outfall.

Q. Yes, sir, and it is included in the Riverside Heading station?

A. Yes, sir, probably that same water is in there too.

Q. And what was the mean average acre-feet of water, then, that went down the river and got into the Riverside Heading during the period of time that we are talking about?

A. That which was diverted into the Riverside Heading was 232,200 as an average for that 16-year period.

Q. In 1954, of course, it dropped to 27,700 acre-feet, is that right?

A. That is correct.

Mr. Grambling:

That is all we have. We pass the witness.

The Court:
Any cross-examination by counsel for Plaintiff?

Mr. Edwards:
Would the Court take a recess of about ten minutes?

The Court:
All right. Mr. R. Marshal, recess Court for ten minutes.

A recess was then had from 10:40 o'clock A.M. until 10:50 o'clock A.M. the same day, at which time proceedings were resumed as follows:

Mr. Grambling:
Your Honor, I overlooked offering Defendant's Exhibit Number 80. I would like to offer that at this time.

Mr. Edwards:
No objection.

The Court:
All right.

Defendant's Exhibit No. 80 was thereupon received in evidence by the Court and this exhibit is copied on the following page:

"D-80".

Annual Figures Showing Pattern of Operation of the River, in Acre-Feet.

	Rio Grande at El Paso	Below American Dam	American Canal	Acequia Madre	Juarez	Riverside Heading	Island Station
1939	511,600	98,700	412,800	60,600	303,900	282,200	49,600
1940	453,900	96,700	356,600	58,200	269,500	269,200	44,000
1941	511,400	131,900	379,400	55,300	329,500	283,800	113,300
1942	1,559,200	1,093,600	465,600	83,900	1,315,900	411,500	1,079,300
1943	631,800	90,300	541,600	61,200	388,700	365,300	111,700
1944	611,900	98,400	513,400	61,800	401,300	316,500	103,000
1945	568,900	76,900	492,200	60,700	356,100	281,700	79,200
1946	497,900	82,800	415,000	60,500	292,400	242,000	46,500
1947	458,900	80,900	377,700	58,000	265,700	210,900	45,900
1948	431,700	85,300	346,200	60,700	243,000	216,700	25,400
1949	463,500	96,800	367,000	60,300	264,400	240,700	56,700
1950	472,600	95,300	377,400	60,600	272,800	220,200	54,500
1951	252,000	51,000	200,800	33,100	122,700	110,000	8,900
1952	283,700	70,100	213,500	49,900	139,900	124,100	5,700
1953	264,500	56,700	205,800	37,800	123,700	113,200	10,100
1954	96,500	22,400	74,100	10,100	40,600	27,700	6,100
Mean	504,400	145,500	358,700	54,600	320,600	232,200	115,600

Mr. Grambling:
We have no further questions.

The Court:
All right. Proceed with cross examination.

On Cross Examination.

Questions by Mr. Edwards:

Q. Mr. Lowry, will you refer to Defendant's Exhibit 80—

A. I have a copy here.

Q. —which is headed "Annual Figures Showing Pattern of Operation of the River, in Acre-Feet". You have a column there, the third column, I believe, from the left, the flow of the American Canal?

A. Yes, sir.

Q. Where does that water go? From the American Canal?

A. That water is diverted into the Franklin Canal.

Q. And where else?

A. Well, it begins splitting up the minute it gets into the Franklin Canal.

Q. And you have a discharge downstream?

A. Yes, sir. That part that is shown under the heading of the Juarez station all came out from the wasteways or somewhere.

Q. Now, this water that you say passes into the Franklin Canal, where does it go to?

A. Part of it is left to go on down the Franklin Canal and part of that, is wasted back through the river. Those are the two parts that make up that column that comes out of the American Canal.

Q. Now, the sewer outfall of the City of El Paso is several miles downstream from the intake of the Franklin Canal, isn't it?

A. From the head of the Franklin Canal?

Q. From the head of the Franklin Canal?

A. Yes, sir.

Q. I want to show you Plaintiffs' Exhibit No. 35, which was introduced in evidence last November, and if we had something we could put it on I would like for you to come around here where the Court can see.

(The exhibit was then put up on blackboard.)

Q. Now, Mr. Lowry, will you examine this map and point out where the heading of the Franklin Canal is?

A. Right at that point there (indicating).

Q. At this point here?

A. Yes, sir.

Q. Now then, where is the City's water treatment plant?

A. Right in this section here (indicating). It is not marked on this map. Right there (indicating).

Q. Now, the water treatment plant is between the head of the Franklin Canal and the sewer outfall?

A. The water treatment plant is right in this section. (Indicating.)

Q. Now then, will you trace the progress of the water that is delivered into the Franklin Canal on down the Franklin Canal and show where that water goes and the area it is served by?

A. I can show you how the canal goes (indicating), and the water that is left in the canal comes on down here and irrigates the area up above.

Q. That irrigates about 17,000 acres, doesn't it?

A. I don't know what the evidence showed.

Q. Well, that sounds about right, doesn't it?

A. Yes, about that.

Q. Now, as to that 17,000 acres, if that figure is correct, there is no other source of getting water to it except through the Franklin Canal, is there?

A. So far as I know that is right.

Q. Yes. And your sewer outfall being downstream several miles from the intake of the Franklin Canal makes it physically impossible for any of the effluent to get into the Franklin Canal and be utilized by any of these 17,000 acres down here (indicating). That's true, isn't it?

A. Under present conditions that is right.

(Plaintiffs' Exhibit 35 was then taken off blackboard.)

Q. Now then, Mr. Lowry, if you will refer to Defendant's Exhibit 79, which is the El Paso Sewage Outfall. I call your attention to the year 1942. The annual outfall there you show is 11,201 acre-feet, do you not?

A. Yes, sir.

Q. Now, that was before the City started taking water or diverting water from the river, wasn't it?

A. I don't recall the exact date they started diverting.

Q. Well, you know it was about October, 1943, before they started putting it back, wasn't it?

A. Well, I am not sure of that. I don't have that in mind.

Q. Well, do you remember then about when it was?

A. Somewhere about that time.

Q. Yes, sir. Now, drop down to the year 1954. You do know that the City's diversions had increased largely from the river between 1942 and 1954, you know that to be true, do you not?

A. I think that is a safe assumption.

Q. Now, in 1954 they returned into the Rio Grande only 14,396 acre-feet as compared with 11,201 acre-feet before they started diversions, which is a difference of only about thirty-one hundred acre-feet, isn't it?

A. That is pretty close.

Q. But during the meantime the City's diversions from the river had increased largely, hadn't they?

A. Well, if they started with nothing in '43, as you say, why, they had increased, yes.

Q. Yes, sir, and to that extent the deprivation of the river of that quantity of water is a deprivation to the lands served by the Project, isn't it?

Mr. Grambling:

That is argumentative and calls for a conclusion.

The Court:

Overruled.

A. Well, there was that much water less in the Canal.

Q. Yes. That's all.

(Witness excused.)

Mr. Grambling:

We have no further evidence on this question, Your Honor.

Mr. Edwards:

If the Court please, since yesterday we have run down some statistics on the matter of costs and we would like to offer a little evidence in connection with the reasonableness of the charge made for the

transportation of the Canutillo well water, by Mr. Phillips, with the Court's permission.

The Court:
All right.

MR. N. B. PHILLIPS, was recalled as a witness for the Plaintiffs, and, first being duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Edwards:

Q. Mr. Phillips, you are the Manager of the El Paso County Water Improvement District Number One, which is the Texas unit of the Rio Grande Project, are you not?

A. Yes, sir.

Q. At my request have you gotten together some statistics concerning the cost to the farmers of delivering water?

A. Yes, sir.

Q. And in that connection did you get the total collections by the District for the years 1954, '53, '52, and '51?

A. Yes, sir.

Q. And did you get the total quantity of water delivered to farms during those years?

A. Yes, sir.

Q. I will ask you to state what your total collections were for 1954?

A. $622,677.80.

Q. And what was the total quantity in acre feet of water delivered to farms for that year?

A. 48,738 acre feet.

Q. And what was the average cost to the farmer per acre-foot for that year?

A. $12.78.

Q. $12.78?

A. Yes, sir.

Q. Now will you go to 1953?

A. Total collections were $651,203.14. The acre feet delivered to the farms was 156,778. The average cost was $4.15.

Q. Four dollars and fifteen cents?

A. Yes, sir.

Q. All right. '52?

A. '52, total collections were $583,934.46. The total acre feet delivered to the farms was 173,067. The average payment per acre-foot for that year was $3.37.

Q. '51?

A. Total collections were $593,140.54. Total acre feet delivered to the farms in that year was 143,014. And the average cost of the farmer per acre-foot, $4.15.

Mr. Edwards:

You may take the witness.

On Cross Examination.

Questions by Mr. Grambling:

Q. Mr. Phillips, give us the mean average for the last 15 years of the average cost per acre-foot?

A. The last fifteen years?

Q. Yes, sir?

A. I will certainly have to go back and refer to my records.

Q. Could you give us the last ten years?

A. Not without going back to my records.

Q. Well, now, you have discussions frequently up there with reference to what it cost. What do you say was the average cost in a normal year?

A. I think that in 1952, the cost of $3.37 would be within a very small percentage of the average cost.

Q. That would be approximately what would be the average cost in your opinion?

A. Yes, sir. In normal years.

Q. I mean in normal years.

A. Yes, sir. In normal years.

Q. Now, you are Manager of this District here at El Paso, aren't you, Mr. Phillips?

A. Yes, sir.

Q. The El Paso County Water Improvement District Number One?

A. Yes, sir.

Q. And that operates like any other utility, doesn't it?

A. Well, I don't know just what you mean by that.

Q. Well, you furnish water to all people who pay for it, don't you?

A. No. The District operates in a rather unique fashion. We merely do two things. We represent the farmers in the District and we act as a fiscal agent for the Bureau of Reclamation to collect the charges for the cost of delivering the water and for the repayment of the Project construction costs, but my District as such has nothing to do with the delivery of the water.

Q. Well, now, you have an engineering background, haven't you, Mr. Phillips?

A. No, sir.

Q. You are a graduate engineer?

A. No, sir.

Q. What work did you do before you came to the Project?

A. Well, I started in probably about 1913 as more or less of a laborer with the Bureau of Reclamation.

Q. Just worked right up?

A. I held different jobs, none of which have been in an engineering capacity, strictly speaking.

Q. What I want to ask you is this, are you familiar with the way in which rates are determined, the fairness of rates is determined?

A. You mean with reference to collection for irrigation district charges by my District?

Q. Yes, sir, or by any governmental authority, or anybody else. What I am trying to get at is, don't they take into consideration the amount of the investment and allow a reasonable return on that investment? Isn't that a uniform practice of establishing a fair rate?

A. I imagine it would be in most instances. In our particular case, why, a determination is made of the amount of money that is to be raised to defray the cost of operation and maintenance each year, and that is placed on the tax roll in such a way that the charge is uniform throughout the entire district on an acreage basis.

Q. Well, now, to get back to this other business where you gave these figures of $12.78 per acre-foot. Did you charge that or collect that from the farmer?

A. No, sir. I did not. I collected from the farmers in 1954 $622,677.80, and there was delivered to the farms in the District who paid this amount of money, 48,738 acre-feet, which means that to divide the number of acre feet into what it cost to get that amount of water it would average $12.78 per acre-foot to the lands.

Q. Well, then, did the farmer pay that amount?

A. The farmer paid $622,677.80.

Q. Well, he paid it on his entire acreage not just on the acre feet that was delivered?

A. All of the farmers paid it on their acreage.

Q. How much an acre?

A. In 1954, I think the rate was in the neighborhood of about nine dollars.

Q. Per acre?

A. Yes.

Q. Well, I thought the farmer paid something like three dollars an acre-foot. Does he pay you nine dollars per acre?

A. Well, you are talking about an acre charge against an acre-foot.

Q. What does he pay for an acre-foot?

A. He doesn't pay per acre-foot. He pays the amount of money that is necessary times his acreage to meet the entire estimate of the cost to operate the District.

Q. Well, I know—here you have shown the maximum amount of acre feet in the year 1952 was 173,000 acre feet?

A. Yes, sir.

Q. And according to the evidence which we have in this case the average amount of water at the Riverside Canal for the last fifteen years has been 232,200 acre feet?

A. Well, I don't think that would have any reflection on this particular year of 1952 because this figure that I have given you is the figure that the Bureau of Reclamation has furnished me as the amount of water that was delivered to the farms in that year.

Q. But it would show that your figure of 173 is about fifty thousand acre-feet of the mean average, isn't that right, for the last fifteen years?

A. Well, that probably would be true, taken from those schedules that you are looking at; however, of course, there is a great deal of difference between the figures that you are looking at and the figures that I am quoting which are actual deliveries on the farms.

Q. Well, these figures I am giving you doesn't even take into consideration the water that is transported by the Franklin Canal to irrigate 17,000 acres between here and Ysleta, and they are taken—these figures also come from the United States Bureau of Reclamation, and the only thing I would say, wouldn't it be a fair statement to say that that figure of 173,000 acre feet does not represent an average figure, as you thought it would, during the past fifteen years?

A. No, I don't think I didn't mean to say that I figured that that figure of 173,000 acre feet would be the mean average figure for the last fifteen years because for the last five years the Project has been experiencing a severe drouth.

Q. Well, the year 1952, which you thought was the normal cost, was $3.37, but if you increase that 232,000 it would reduce the average cost per acre-foot substantially, would it not?

A. Yes, sir, I think it would

Q. Then $3.37 would be high and not a normal figure?

A. Well, I said that I thought that the figure of $3.37 was within a reasonable discount, a reasonable percentage, of being normal.

Q. Would you think it was within sixty percent of being normal?

A. I think it would be better than that. Without having any figures to back up my statement, I would imagine that the average cost would be about three dollars an acre-foot over a long period of time.

Q. You say that would be about the average cost per acre-foot, three dollars, to the farmer?

A. Yes, sir.

Q. Mr. Phillips, there has been some testimony here this morning about the fact that none of this effluent which came out from the sewage plant of the City of El Paso went into the Franklin Canal and irrigated any part of the 17,000 acres irrigated by the Franklin Canal. That is true, isn't it?

A. There is no part of the sewage effluent that could possibly reach the Franklin Canal.

Q. And, therefore, it doesn't reach the acres that are irrigated by the Franklin Canal?

A. No, sir.

Q. Well, now, is there any distinction made, do you have Class "A" and Class "B" land, that is land irrigated from the Franklin Canal and land irrigated from the Riverside Heading?

A. No, sir.

Q. In other words that land which is irrigated from the Riverside Heading is a part of your Project, isn't it?

A. Yes, sir.

Q. And there's about 28,000 acres irrigated there?

A. I think there is a little more than that.

Q. And that land is entitled to the same allotment of water that these same 17,000 acres that are irrigated by the Franklin Canal are entitled, is it not?

A. Yes, sir.

Q. And it has the same properties, does it not?

A. Yes, sir.

Q. And the same charges are made for water?
A. That is right.

Mr. Grambling:
That is all.

On Re-Direct Examination.

Questions by Mr. Edwards:

Q. Mr. Phillips, getting back to the question that Mr. Grambling was asking you about the amount of water that reached the Riverside Heading, and so forth. You have given your testimony here based on net deliveries of water, haven't you?

A. To the farmers.

Q. Yes, sir. And Mr. Grambling has been inquiring about gross diversions, hasn't he, from the tables that he has over there?

A. I think so.

Q. Is there a difference between gross diversions and net deliveries?

A. A great deal of difference.

Mr. Edwards:
That is all.

On Re-Cross Examination.

Questions by Mr. Grambling:

Q. I didn't take into consideration this 232,000 acre feet that I was talking about, the water that passed down the Franklin Canal and didn't go into the Riverside Heading, did I?

A. I don't think you did. I am not familiar with the table that you are talking about.

Q. Of course, that would more than offset this difference between that gross diversion and net amount that counsel referred to?

A. Ask that question again, please.

Q. I said that would more than offset any difference between the gross amount passing the Riverside Heading and the net amount reaching the farmers?

A. You mean the amount—

Mr. Edwards:

Wait a minute. The witness hasn't seen the exhibit. I suggest that you let him look at it.

Mr. Grambling:

I took that hypothetical question that you asked him and just asked him about it.

A. I don't think I could answer that question.

Q. Well, in any event, this 232,000, the water which passed the Riverside Heading is not a part of the water in the Franklin Canal as you just stated, is it?

A. That is right.

Mr. Grambling:

That is all, Your Honor

(Witness excused.)

Mr. Edwards:

That is all we have, Your Honor.

Mr. Grambling:

That is all, Your Honor.

EVERETT J. BRADT, a witness for the Plaintiffs, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Scott:

Q. Please state your name.

A. Everett J. Bradt.

Q. You live in El Paso, Mr. Bradt?

A. Yes, sir.

Q. How many years have you resided here?

A. I have been here fifty-five years.

Q. Are you connected with the general contracting firm of J. E. Morgan & Sons?

A. Yes, sir.

Q. They have their office here in El Paso?

A. Yes, sir.

Q. Was Mr. J. E. Morgan, deceased, the founder of that business?

A. Yes, sir.

Q. What year did you start working for Mr. J. E. Morgan?

A. I started working for J. E. Morgan in 190, on holidays and between school periods.

Q. With the exception of perhaps two or three brief intervals have you worked for that concern continuously since that time?

A. Well, f course, I had two pretty long intervals in between that I was not with them. I left them in 1906 and then I went back with them in 1917 and went back to work for them about 1919.

Q. With those exceptions you have been working with that concern since 1903?

A. That is right, yes, sir.

Q. Now, do you know of your own personal knowledge whether that contracting firm or concern built the City sewage treatment plant located near Washington Park in the City of El Paso?

A. Yes, sir, they did.

Q. And you have a record with you that could show the year in which the construction of that plant was begun and when it was finished?

A. Yes, sir. We have.

Q. Will you please state that time?

A. Well, according to the records, the construction started about March 1, 1911, and the job was substantially completed in December of the first year.

Q. You mean in December of that year?

A. 1911, yes, sir.

Q. Are you familiar with the plant in a general way at least?

A. Oh, yes, pretty familiar with it.

Q. Has your firm done work on the plant subsequent to the time it was constructed?

A. Some work, yes, sir. Not a great deal of it. They have done some out there sometimes.

Q. Is sewage effluent or sewage treated in that plant discharged into the Rio Grande?

A. Prior to the building of the plant?

Q. No. Since building the plant has the sewage treated in the plant been discharged into the Rio Grande?

A. Well, I am sure it has been.

Mr. Grambling:

Well, now, Your Honor, if he doesn't know, we will object to that.

The Court:

I sustain the objection since apparently he doesn't mean to say that he knows.

Q. Do you know what disposition is made of the effluent after it leaves the plant?

A. Yes, sir; I know it is discharged in the river.

Q. Well, now prior to the construction of that plant, had you, as a boy and youth fished along the banks of the Rio Grande in that general area there we are speaking about?

A. Yes, sir.

(Witness excused.)

• • • • • • • • •

W. F. RESCH, a witness for the Plaintiffs, first having been duly sworn, in answer to questions propounded, testified as follows:

On Direct Examination.

Questions by Mr. Edwards:

Q. You are Mr. W. F. Resch, the Project Manager of the Rio Grande Federal Reclamation Project?

A. Yes, sir.

Q. And the same W. F. Resch who testified on the original hearing of this case back in November of 1954 and again in June of this year, 1955?

A. Yes, sir.

Mr. Edwards:

I will ask the Court Reporter to mark for the purposes of identification a plat which I will now hand him.

(Same was then marked for identification as Plaintiffs' Exhibit Number 153.)

Q. Mr. Resch, I will ask you whether or not Plaintiffs' Exhibit Number 153 was prepared at our request in your office and under your supervision?

A. It was.

Q. Is it drawn to scale?

A. No, sir. It is not.

Q. What is it?

A. It is a sketch map, strictly for visual review, of the physical conditions of the Rio Grande from the American Dam to the El Paso-Hudspeth County Line.

Q. Mr. Resch, I will ask you to refer to this map, beginning with the left end of it, and it shows across the river two little dots on each side in one place and a third one upstream there marked "Rio Grande El Paso Gage". When was that gage installed?

A. The upper dot is a gage that was installed in 1938 following the beginning of operation of the American Dam. The two dots below are the old gauging station known as the "El Paso Station" or the "Courchesne Station" that was located at that point in 1899.

Q. Now, Mr. Resch, when you refer to water passing El Paso, do you refer to water passing the position of this gage on the river?

A. Yes, sir.

Q. That is what is customarily referred to as "El Paso"?

A. That is correct.

Q. That is the gage itself?

A. Yes, sir.

Mr. Grambling:

We object to that leading type of testimony, and we object to the witness changing his testimony at this time because he previously testified to the water passing El Paso without any qualifications. Now he is qualifying it so it loses all meaning.

Mr. Edwards:

He is qualifying it so it shows what exactly he did mean and does mean when he says "water passing El Paso."

The Court:

I will overrule the objection.

Q. Now, Mr. Resch, coming on further down the river there you have an object that is marked "American Dam." When was the American Dam constructed and by whom?

A. The American Dam was constructed during 1937 and put into operation in 1938 by the International Boundary and Water Commission.

Q. As shown by your map, the headgate of the American Canal is immediately upstream from the American Dam?

A. That is correct.

Q. Now, following down the river you find two more connected dots below the American Dam, and it is referred to as "Below American Dam Gaging Station." Now, when was that gage put in? That gaging station?

A. In 1938 following the beginning of operation of the American Dam.

Q. And on the American Canal there are two little dots, one on each side, connected with a dotted line, marked "American Canal Gaging Station." When was that gaging station constructed?

A. In 1938.

Q. And by whom was it constructed?

A. The International Boundary and Water Commission.

Q. Did I ask you who constructed the "Below American Dam Gaging Station"?

A. I do not think that you did.

Q. I don't think so. Who did construct that?

A. The International Boundary and Water Commission.

Q. Now you come further down the sketch to the right and along the river you have an indication here of the "Franklin Canal Settling Basin Wasteway", with an arrow pointing to the indicated means of discharge from the settling basin into the river. Is there now or has there ever been a gage on that Franklin Canal Settling Basin Wasteway?

A. No, sir. Not to my knowledge.

Q. Has there ever been to your knowledge any reason why a gage should be there?

A. No, sir.

Q. Immediately below the settling basin there is a structure indicated as the "Mexican Dam". When was that constructed and who constructed it?

A. According to records in our office there has been a dam at the site of the present Mexican Dam for nearly three hundred years.

Q. And the sketch indicates the headgate of the "Acequia Madre" which, as I understand, is the main canal feeding water into Mexico, is immediately above the Mexican Dam, is that correct?

A. That is correct.

Q. With two little connected circles there showing a gaging station for the Acequia Madre. By whom was that gaging station constructed and by whom is it operated?

A. To the best of our knowledge that gaging station was constructed and is operated by agencies of the national government of Mexico.

Q. Following your sketch on to the right along the Franklin Canal, the next item that we observe there is the "Old Santa Fe Wasteway." When was that constructed and is it now in use?

A. From the records in our office it appears that there was a wasteway at that point prior to the reconstruction of the Franklin Canal by the Bureau of Reclamation in 1913 and 1914.

Q. Then further on down the Franklin Canal there is a rectangular object there with diagonals across it which is marked "City of El Paso Water Treatment Plant." Is that the structure concerning which there has been rather voluminous testimony in this hearing heretofore?

A. It is.

Q. And between it and the river is another little rectangular structure which is marked "City of El Paso River Pumping Plant". Now, just to refresh our recollection, when were these structures erected and by whom?

A. The City of El Paso Water Treatment Plant shown on the bank of the Franklin Canal went into operation in November of 1943. The City of El Paso River Pumping Plant on the bank of the Rio Grande went into operation for test purposes in June, 1939.

Q. Further downstream in the river, and also downstream along the Franklin Canal is an outlet

from the Canal to the river which you indicate on your sketch as being the "Leon Street Wasteway."

A. Yes, sir.

Q. When was the Leon Street Wasteway installed?

A. The Lein Street Wasteway was constructed in 1914 during the period in which the Franklin Canal was being reconstructed. It is possible that there was a wasteway near that same location prior to 1914.

Q. And downstream from the Leon Street Wasteway on the Franklin Canal again there is shown two connected dots labeled "Franklin Canal Gaging Station." What is the purpose of that and by whom was that constructed?

A. The purpose is to obtain the daily flow record of the Franklin Canal, and the gage was first installed there in 1914. It is maintained and operated by the Bureau of Reclamation.

Q. Now, is that the most upstream gage that is operated by the Bureau of Reclamation in this area?

A. Yes, Mr. Edwards, but I would like to introduce a little clarification there. This year we installed for investigation purposes a staff gage in the Franklin Canal Settling Basin Wasteway. That gage was strictly for investigational purposes and no record whatever has been computed from that gage.

Q. Yes, sir. Now, Mr. Resch, I will ask you to explain the use and the function of the Franklin Canal Settling Basin Wasteway and the Leon Street Wasteway.

A. The purpose of those wasteways, prior to construction of the American Dam, was to return to the river below the Mexican Dam sufficient water so that the silts and muds and sands would not be carried down into the Franklin Canal system. An irrigation system is a very delicate thing, almost as delicate

as the human body, and you can throw it out of operation or out of function, if you get too much sand or too much silt it becomes impossible to deliver water, and instead of having water in the canal system you would have a large volume of sand or silts of muds; consequently, it is necessary on the Rio Grande, through this section of the Rio Grande, to return to the river a volume of water in order to move out the sands, silts and muds.

Q. Now, on the Leon Street Wasteway, is there now or has there ever been to your knowledge any gage?

A. There is a staff gage there that permits the gate-tender to maintain an elevation of water at that point. It is not a gage for record purposes nor has there any record ever been derived from such gage or estimates of the flow passing through the river made at that point from those gage readings.

Q. Now, Mr. Resch, what is the method of operation of the system, beginning with the Franklin Canal Settling Basin Wasteway, and under what circumstances are the wasteways at the settling basin and at Leon Street used?

A. Since the beginning of operation of the American Dam in 1938 all of the water for the American side of the river that passed down the American Canal from the American Dam, that is true in all cases except several times during the summer when we may have flash floods or when it may become necessary to sluice the mud and sand from the American Dam, the water from the American Canal then passes into what is known as the settling basin of the Franklin Canal. The settling basin derives its name from the fact that it was originally constructed to permit the accumulation of sands and silts and

muds in excess of that which would not pass out through the Franklin Canal Settling Basin Wasteway. The Franklin Canal settling basin receives the water, as I stated, from the American Canal. The water is then passed down the Franklin Canal from the lower end of the settling basin. When sufficient water is available an unknown quantity is returned to the river from the Franklin Canal settling basin wasteway for sluicing purposes, or in case of an excessive amount of water that we cannot handle in the lower reaches of the Franklin Canal it is so returned to the river at that point; water then proceeding down the Franklin Canal in past years and for sluicing purposes or emergency purposes was in part returned to the river from the old Santa Fe Wasteway, and now due to the extreme water shortage that we have been experiencing for several years the Santa Fe Wasteway has not been used extensively and in fact at the present time it is closed off. The gate stems and wheels have been removed. However, in the event that sand conditions and silt conditions become bad we can within a few days, very few days time, reopen that wasteway. We then proceed down to the Leon Street Wasteway, and at that point additional water is returned to the bed of the Rio Grande and the flow for the Franklin Canal passes below that point and thence on down into the Franklin Canal system.

Q. Now, Mr. Resch, who exercises the judgment as to when the Franklin Canal settling basin wasteway and the Leon Street wasteway are to be used?

A. That is more or less left up to the man that is immediately on the job. It is a day to day operation, and it is a part of his duties that he is to use the wasteways in the most effective manner from the

standpoint of returning the sands and silts back to the bed of the Rio Grande. It is not improbable that what that man through the years has returned water from the settling basin wasteway at such time as the flow may be four hundred cubic feet a second coming down from the American Canal, or prior to the American Canal it was being diverted from the Rio Grande. It was also quite possible that in his judgment he may permit the flow from the American Canal to reach six, seven, or eight hundred cubic feet per second before he returns any water out at that point, depending on his day to day judgment, he then carries the water on down to the Leon Street Wasteway, with in former years some of the water being returned to the Rio Grande from the Santa Fe Wasteway. We don't have any record whatever of what that amount of water has been, and consequently, at the Leon Street Wasteway he makes his last return to the river for sluicing purposes and to turn out at that point the volume of water that we cannot carry down through the Franklin Canal.

Q. Now, have there ever been any records kept as to the quantity of water returned to the river through the years at the Franklin Canal Settling Basin Wasteway or the Old Santa Fe Wasteway or the Leon Street Wasteway?

A. No, sir, except as I explained a few minutes ago that this year we attempted to make some investigations up there and installed a staff gage just below the Franklin Canal Settling Basin Wasteway for investigational purposes. However, those investigations have not proved to be very fruitful. The records gage has been installed up there for several weeks and has become inoperative as a result of high velocity of water flowing by and throwing the gage

out of line, and the record of two weeks that we obtained there is of little or no benefit. The staff gage that we used on the Franklin Canal Settling Basin Wasteway is for the purpose of trying to determine discharge coefficient, that is, to see if by measuring the gate opening and determining the head of water in the settling basin, if we could develop a rating curve for the gates. Those investigations have not been concluded but they have not been fruitful because we found it quite difficult to determine the elevation of the tail water on the river side of the gate.

Q. Have there been any records of any estimates over the years past as to the quantities of water being returned to the river from the Franklin Canal Settling Basin Wasteway or the Old Santa Fe Wasteway or the Leon Street Wasteway?

A. No, sir, except my efforts during the past several months to see if there was any manner in which we might estimate such water.

Q. And did you find any records whatsoever upon which you could base any reasonable estimate as to the quantities that had been returned to the river over the years past?

A. No, sir. I have not.

Q. Now, proceeding further downstream in the river, you have indicated the "City of El Paso Sewer Outfall." How long has that outfall been in that particular neighborhood?

A. Well, either at the same location or the near location to my knowledge since 1925. I had occasion to walk that river bank from Cordova Island down to almost the Ascarate Wasteway, which is East of the present sewer outfall, in 1925, and I encountered at that time some brackish water that had some sewer

odor and it was then an appreciable volume and I surmised that that was the outfall of the City of El Paso Sewage Department.

Q. And that was in 1925?

A. Yes, sir. I am not certain whether it was that exact location or not.

Q. But it was in that area?

A. In that vicinity.

Q. Now proceeding further downstream from the location of the "City of El Paso Sewer Outfall" we have again on each side of the river a dot connected with a broken line there marked "Juarez Gaging Station." By whom was that constructed and who has the responsibility of the operation of that gaging station?

A. That gage was constructed by the Mexican Section of the International Boundary and Water Commission, and the computation of records is by that Mexican agency. However, the American Section of the International Boundary and Water Commission makes frequent current meter measurements from that cable station.

Q. How often are the readings of the Juarez Gaging Station by the Mexican Section of the International Boundary and Water Commission made available to the public or published, or available to anybody.

A. Well, the records are published in the water bulletins of the International Boundary and Water Commission. However, the bulletins are not current and the last one that we have is I think 1952, with the result that we have to make request for the release of preliminary information. We make that request to the International Boundary and Water Commission and I understand that they in turn forward the request of the Mexican officials

Q. Where are those records kept, do you know?

A. I think it is in Nuevo Laredo or Monterrey. I am not certain of where their hydrographic office is, but it is not in Juarez unless it has been recently placed over there.

Q. How many months ordinarily elapse before the provisional records are obtainable?

A. We have in the past several years made request for preliminary data from the Juarez Station and it takes from three weeks to two months to obtain the data.

Q. That is the provisional data which is not the published reports?

A. That is correct, sir.

Q. Now, further downstream we have a rectangular object there with diagonals across marked "E.P.C.W.C. & I.D. No. 1 Sewer Outfalls", and indicates another one further downstream. What are those?

A. Those are the sewer outfalls out of the El Paso County Water Control and Improvement District No. 1, which is the District that provides sewerage and domestic water for the area lying between El Paso to and including Ysleta.

Q. Now, that is not the same organization as the El Paso County Water Improvement District Number One which is a party in this litigation, is it?

A. No, sir, it is not.

Q. Between those two sewer outfalls you have indicated here a connection or discharge from the Franklin Canal to the river. What is that and under what circumstances is it used?

A. That is another control wasteway from the Franklin Canal which was constructed for two reasons: one was to return water at that point so that

sand and silt that had sucked in, evading our efforts at Leon Street to return it to the river, passing on down the Canal, can be returned to the river; in other words, we then turn water out at this Ascarate Wasteway to put more sand and silt into the river at that point. In addition, it has a function of serving as a control wasteway. Any time that an emergency would develop on the system below that point we open the gates there and return the water to the river, although, in normal years we tried to keep a flow to the river at that point for a good portion of the time, perhaps half of the time.

Q. And is the name which has been assigned to that particular wasteway the "Ascarate Wasteway"?

A. Yes, sir. That is true.

Q. And what you had to say applied to the connection here labeled "Ascarate Wasteway" on this map?

A. Yes, sir.

Q. Now, following the Franklin Canal further down we find another branch off of it dropping down toward the river and entering into a somewhat complicated system of canals there. Just what is that and what is the use of it?

A. That is the "Southside Feeder Canal" from the Franklin Canal to the Riverside Canal. The original purpose of that Southside Feeder was to provide additional water to the original San Elizario Canal System which is now known as the Riverside Canal System. The waters so passed down through that point are fed into the Riverside Canal System in a minor quantity.

Q. Immediately below that area there is a structure indicated as being the "Riverside Canal Heading." What is that and what is the purpose of it?

A. The Riverside Canal Heading diverts water from the Rio Grande at that point. The water so diverted is for use in the irrigation of the lands in the Clint area, the Fabens area, the Island area, and the Tornillo area.

Q. Now, when you refer to that as being a heading, in the language of the ordinary man on the street that is a dam, isn't it?

A. In effect it is a diversion dam across the river from which the canal diversion is made.

Q. And constructed so that the gates may be raised or lowered to allow the water to pass downstream or be diverted into the riverside canal, is that correct?

A. Yes, sir.

Q. And on the East bank of the river, on each side of the Riverside Canal, there are indicated again a dot connected with another dot on the opposite side with a broken line, and that is indicated as being the "Riverside Canal Gaging Station" What is the purpose of that ad who constructed it?

A. That gage located at that point is for the purpose of determining the volume of water that flows into the Riverside Canal. The automatic water record is located on the south or right bank of the canal and the current meter measurements are made approximately three-quarters of a mile down the canal from the bridge structure.

Q. Now, downstream again from the Riverside Canal Heading there is shown an outlet from the Riverside Canal I take it into the bed of the river, which is designated on the map as being the "Riverside Wasteway No. 1" What is its function and what is its method of operation?

A. The Riverside Wasteway No. 1 permits the sluicing of the sands and silts from the upper section of the Riverside Canal back to the Rio Grande, as well as serving as an emergency control point.

Q. Now, you have referred several times in your testimony today to emergency controls. What do you mean by the term "emergency control" and to what situations would it apply?

A. If below the Riverside Wasteway No. 1 the canal should break it would be necessary to get the water out of the canal as rapidly as possible; consequently, it could be returned to the river at that point. In addition, during periods of infrequent floods in the Rio Grande, water often gets into the head of the canal with the gatetender not being present. He may be down several miles in the system. Consequently, we immediately have more water than we can handle, so the first thing that somebody does is to rush to the Riverside Wasteway No. 1 in order to turn back to the river that excessive amount of water that got in during the gatetender's absence.

Q. And following further downstream we have another outlet from the Riverside Canal into the river which is marked "Riverside Wasteway No. 2." Is there any difference or distinction between the function of Wasteway No. 2 and Wasteway No. 1 as applied to the Riverside Canal?

A. No, sir. The functions are the same.

Q. And continuing downstream on the river from the Riverside Wasteway No. 2 there is shown a dot on each side of the river connected by a broken line and marked "Island Gaging Station." What is that?

A. That is a gaging station installed by the International Boundary and Water Commission in 1938 for the purposes of determining the flow of water in the Rio Grande at that point.

Q. And who installed that station?

A. The International Boundary and Water Commission.

Q. Now, between the Island Gaging Station and the "Below American Dam Gaging Station", I will ask you whether or not there are any gages on the river under the control of the American Section or the Bureau of Reclamation? Now, the Juarez Station you said was under the control of the Mexican Section of the International Boundary Commission, but aside from that Juarez Gaging Station under foreign control, are there any gages on the river at all in the area or between the points that I have mentioned?

A. There is a water staff gauge below the Riverside Canal Heading. The purpose of that gage is not for record purposes and no record is computed at that point. The gage permits us to check on the operations of the Riverside Canal, by that trace developed by that gage will show us when water has been passed down the river below the Riverside Canal Heading.

Q. Without record purposes?

A. Without record purposes.

The Court:

It is not indicated on the map?

The Witness:

No, sir, because it is not for record purposes.

Q. Now, Mr. Resch, if you will continue, down further on the river, you have indicated on your sketch here the general course of the river and also the general course of the Riverside Canal to a junction with the Franklin Canal and a later split into the

Tornillo Canal and Fabens Waste Channel, and if you follow the waste channel down you find another outlet into the river. What is that?

A. The outlet of the Fabens Waste Channel to the Rio Grande permits the return to the river at that point of waters from the drainage system that have been developed in the El Paso Valley between El Paso and Fabens. It is that portion of the drainage waters which are not put into the Tornillo Canal for use in the Tornillo District. At the same time there is an arroyo that discharges into the Fabens Waste Channel and that arroyo flow, when it so happens is also carried down into the Rio Grande.

Q. Now, continuing further down the river you have another outlet into the river indicated as the "End Tornillo Canal Wasteway." What is that and what is its purpose?

A. That is the final waterway of the Rio Grande Project. Any waters passing out of the Tornillo Canal and not diverted into the Hudspeth Canal or the Hudspeth Regulation Reservoir No. 1, both of which are facilities of the Hudspeth County Conservation and Reclamation District Number One, those waters are returned to the river at that point.

Q. Now, paralleling the river over in the right-hand edge of the map there is shown a canal labeled "Hudspeth Feeder Canal No. 1", with two dots connected by a broken line across the canal indicated as "Hudspeth Feeder Canal No. 1 Gaging Station." Who installed that gaging station and what is its purpose?

A. That gaging station was installed and it is operated by the Bureau of Reclamation for the purpose of determining the diversion of water from the Fabens Waste Channel into the Hudspeth Feeder Canal No. 1.

Q. On the extreme right of the map, on the river, there are indicated on each side of the river two dots, one on each side again connected by a broken line and labeled "County Line Gaging Station." What is that?

A. That is a gaging station maintained near the county line across the Rio Grande, constructed and line and labeled "County Line Gaging Station." What Commission.

Q. In what respect do these gages on the canals differ from the gages on the river that were constructed and operated by the International Boundary and Water Commission, indicated here as the "County Line Gaging Station" and the "Island Gaging Station", and the "Below American Dam Gaging Station"?

A. Well, the river gaging stations are more expensive than are the canal stations because they require heavier type equipment than is necessary on the canals.

Q. Mr. Resch, I call your attention to some photographs which were introduced in evidence on the original hearing and marked "Plaintiffs' Exhibit Number 75", "Plaintiffs' Exhibit Number 76" and "Plaintiffs' Exhibit Number 78", and ask you to examine them in the order that I have mentioned them. (Hands same to witness.) What is No. 75?

A. Exhibit 75 shows the automatic water stage recorder shelter at the Rio Grande Island Gaging Station. The line immediately back of the gage pipe is the cableway over which the engineers car is operated.

Q. Now, that cableway extends entirely across the river to a support on the other side, does it?

A. Yes, sir.

Q. And Exhibit Number 76 is what?

A. Exhibit Number 76 is a view of the bottom portion of the automatic water stage records shelter showing the staff gage installed on the outside of the pipe.

Q. And Exhibit Number 78 (indicating). I think it has been identified as the Fort Quitman Gaging Station. Is that on the American side?

A. Yes, sir. This picture is looking upstream from the American side at the Fort Quitman Gaging Station.

Q. And the cable that you see extending from the support on the extreme right across the top of the gage and on out to the left of the picture is the one extending across the river to a similar support on the Mexican side?

A. Yes, sir. And it also shows on that cable the car that the engineer uses to make his current meter measurements.

Q. Does he sit in that car and pull himself along on the cable across the river?

A. Yes, sir.

Q. Now, Mr. Resch, are the installations that are made, such as you have described there as the gaging stations on the river, installed and operated by the International Boundary Commission or does the Bureau of Reclamation have anything to do with those stations?

A. No, sir. We do not have anything to do with those stations.

Q. You have testified, I believe, in effect, that there is no such gaging station at the river opposite the City Water Treatment Plant, is that correct?

A. That is correct.

Q. Now, in the first place, if any such installation were made, would it be necessary to secure the consent of the Mexican Section of the International Boundary and Water Commission and the American Section of the International Boundary and Water Commission, or could the Bureau of Reclamation just go down there and install it?

A. No, sir. We could not install a gaging station there without the concurrence of the two sections of the International Boundary and Water Commission.

Q. In the next place, if such a gaging station were installed there what would be the cost of it?

A. I would estimate that the cost of a station similar to the existing stations along the river would cost around four thousand, perhaps forty five hundred dollars. That is a mental calculation.

Q. Now, referring again to the map over on the left side and to the bottom you have a table which you have indicated "Distance in Miles—Via Rio Grande." I wish you would explain that, please, and just how it is to be used.

A. This table which is titled "Distance in Miles—Via Rio Grande" lists all of the principal features from the American Dam downstream to the El Paso-Hudspeth County Line and to one feature beyond that, the "Hudspeth District Alamo Canal Heading." The distance from any point along the river can be determined from this table. As an example, if it was desired to determine the distance from the Mexican Dam to the Leon Street Wasteway, we come down to the Mexican Dam and go out horizontally to the point where we find the Leon Street Wasteway in the diagonal section of the table. At that point we find a mileage of 1.5—and, incidentally, the mileages are given to the nearest tenth of a mile. In that same

manner, or, if you desire you can work in the opposite direction, you can pick up your point in the diagonal section of the table, go down to the line opposite the feature in the vertical section of the table, and pick up the appropriate distance.

Q. Now, your distances as given in the table, as I understand, are correct to the nearest tenth of a mile?

A. Yes, sir.

Q. But you could not use that distance as a scale to apply to the map, is that right?

A. That is absolutely true.

Q. Now, proceeding further over to the right, "Distance in Miles—Via American-Franklin Canals." How is that to be used as a source of information?

A. That table permits a determination of the distance from the American Dam to all of the features along the canal down to and including the Franklin Canal Gaging Station, and the procedure of determining the distances is exactly the same as in the first table.

Q. And immediately below that "Actual Average Daily Operating Flow in Cubic Feet Per Second." What is that?

A. That table represents the average daily flow for the three canals—the American Canal, the Franklin Canal, and the Riverside Canal—for two time periods and two irrigation season periods. The first time period is from 1944 thru 1950 for the irrigation period of June, July and August. The second time period is from 1950 thru 1954, and for the other irrigation period the months of March, April, May and September, for the same two time periods. The figures representing the flows are the average discharge in cubic feet per second per day for those

periods as given for each of the three canals. Incidentally, averages are sometimes erroneous in that they do not give you the true picture. Included in the March-April-May-September averages, of course, the total number of days in each month, in each of the months, was used, but sometime during each of those periods there was no flow in any of those canals. Consequently, the averages are somewhat misleading in that you use an entire month, and consequently, in speaking of monthly averages you reduce below the actual flow average the flows that existed in the canals.

Q. Now, the table further to the right, "Canal Capacities in Cubic Feet Per Second." In that table you have indicated the canal's design capacity and operating capacity. What is the difference between the design capacity and the operating capacity?

A. The design capacity is something that the planning engineer or the designing engineer establishes to set up a section or structure that is desired to be constructed; while the operating capacity, after the structure has been built and put into operation, is an optimum capacity desired to operate under.

Q. And in your "Operating Capacity" here, with reference—well, let's say, to the Franklin Canal below Leon Street, it shows 300 to 350 second feet. That simply means that if you had available 300 to 350 second feet you could use it?

A. Yes, sir. That would be our desire, to operate the Franklin Canal between those two figures. Now, that does not imply that that happens day in and day out.

Q. In other words, the fact that you have an operating capacity is no assurance that there is going to be water there to operate it at that capacity?

A. That is correct. The fluctuations in the canal system are rather large and vary somewhat from day to day with the exception that we have closer control on the Franklin Canal than any of the other two canals. That control is effected by the Leon Street Wasteway.

Q. Now, Mr. Resch, I will ask you whether or not there are available to you any records showing the flow of the Rio Grande in the bed of the river alongside the City of El Paso River Pumping Plant from which that proportion of the total diversions from the Rio Grande into the Riverside Heading which move via flows in the river bed alongside the defendant's river pumping plant during the five years of 1950 through 1954 or other previous years can be calculated?

A. No, sir, I do not have any records and I do not know of any records.

Q. Mr. Resch, if such records in fact did exist and were available to you what would be the extent of the burden imposed if such calculations had to be made? In other words, could anybody sit down and do that or would it take a water engineer, and if it would take a water engineer, how long would it take him to do it?

A. Well, it would take a trained man, a hydrographer, hydraulic engineer, or civil engineer, a long period of time. You can take such a man and train him to do that type of work and get the most immediate benefits than using a young engineer. To make the computations, we may assume that there was a gaging station across the river in that segment, the records could not be computed, of course, until the final day of the month had been reached and terminated. It is true that depending on the type

of automatic station recorders that we use you might make your preliminary computations on a weekly basis by taking off each week from the records chart; however, you would come up to the end of the month and perhaps the chart would still have two or three more days to run before you would desire to pull it off so that you would not disturb the full week record. If the current meter measurements that were made from this station outlined a sufficiently accurate rating curve your computations could proceed and be completed within a matter of a day or two, but in this particular segment of the river it is doubtful if a sufficiently accurate stage flow relationship could be obtained, for this reason, water at that point is subject to scour and fill-in—

The Court:

Subject to what?

A. Scour. That is, if water passes down the river in volumes it has a tendency to roll sand and pick up something, and by suspension above the sand you lower the depth of the water under a sufficient volume of water to begin such action. That condition would affect the accuracies of your rating curve. Now, the rating curve is nothing more or less than this: Against the vertical axis and the horizontal axis, usually using gage heights on the vertical axis, you then plot on the horizontal axis the flow; in other words, you plot gage height against the flow and you get a series of points out in this chart. If your accuracy has not been interfered with as a result of scouring or filling or back-water effects those points will wind up on a curve or close to a straight line; consequently you had a good rating curve, but due to

the scour or fill that is taking place during the period that your record is in operation, those points would have a tendency to scatter, one would plot way above it, perhaps the next one would plot way below, and the condition would be the same if it was scouring into the river bed or filling in the river bed, or if it was back-water effects from the Leon Street Wasteway as a result of different flows coming out of that wasteway meeting the flow, if any, that might be coming down that section of the Rio Grande, there would be a tendency wherever that point occurred for the water coming out of the Leon Street Wasteway to interfere with the normal flow as it passes down the river; consequently, so that the river could adjust itself to that condition, there would have to be a rise upstream in the water surface elevation. Now, under those conditions you likewise would get these scattered points on this rating curve. If the scattering was large your record would have an accuracy of fifty, sixty, seventy percent. No one would know until the condition was actually investigated. If an effort was made to determine the flow directly from the wasteways it would probably require the installation of two water stage recorders in the Franklin Canal Settling Basin and two at the Leon Street Wasteway, with some effort being made to keep up with the gatetenders, that is, with the gate openers because you would have to relate the elevation of the water above the gate and below the gate to the gate opening in order to arrive at an estimate or computation of the flow under that gage or over that gage. Now, on the latter condition, at any time the flows would happen over the gage then your criteria for making the computations would be again upset.

Mr. Edwards:

At this point we would like to offer in evidence the map or plat concerning which the witness has given his testimony and which has been marked by the Reporter for identification as "P-153".

Mr. Grambling:

No objection.

(Plaintiffs' Exhibit No. 153 was thereupon received in evidence by the Court, but same is not adapted to being copied and is to be sent to appellate Court as an original exhibit under order by the trial Court.)

Q. Mr. Resch, the record shows that the City is now and for many years has been dumping into the bed of the river its effluent discharge from its sewer outfall. Is there any practical means at the disposal of the Bureau of Reclamation to separate that effluent from other water that is in the river? In other words, has the Bureau any choice but to take and allow that effluent to become co-mingled with the other waters and used, if other waters are used, on Project land or delivered to Hudspeth County?

A. No, sir. We do not have any other choice, except during the non-irrigation season, when there is no requirement for irrigation in the lower Riverside Canal system, and under such condition we would pass down the bed of the river all of the water, including the sewage water, below the Riverside Canal Heading.

Mr. Edwards:

You may take the witness

On Cross Examination.

Questions by Mr. Grambling:

Q. Mr. Resch, when did you close down the Old Santa Fe Wasteway?

A. I believe we closed that, removed the grate machinery, in January of 1954.

Q. Well, up to that time you were using that wasteway to waste substantial quantities of water from the Franklin Canal into the river, weren't you?

A. No. I testified that during this period of water shortage we had not used that wasteway as extensively as previously.

Q. Well, you had used it, though, previously, let's put it that way. I know you closed it down.

A. Well, we must assume that it was used from time to time.

Q. You did—it would be a fair statement, would it, Mr. Resch, to say you did use it prior to the time it was closed down from time to time at frequent intervals to waste substantial quantities of water from the Franklin Canal into the river?

A. No, sir. I couldn't concur in that statement. I don't know how much water was turned out that wasteway. I don't know whether it was a minor or a substantial amount, and I don't know how many days it occurred or on what days.

Q. It would be a fair statement to say that you did use it to waste water from the Franklin Canal into the river?

A. For what period?

Q. During the period prior to 1954: from time to time. Not continuously, but from time to time.

A. I would assume the wasteway was used.

Q. Mr. Resch, you know it was, don't you?

A. No, sir.

Q. You were Project Manager and you knew it was put there for that purpose?

A. It was put there for the purpose of use.

Q. For the purpose of diverting water from the Franklin Canal to the river, wasn't it?

A. When necessary.

Q. When necessary in your judgment?

A. No, sir, not in my judgment.

Q. In whose judgment?

A. In the judgment of the man on the job.

Q. If that man's judgment differed from yours he wouldn't be there long, if he didn't follow your judgment?

A. Well, Mr. Grambling, I don't supervise all of the men on the Project. That is impossible for me to do so.

Q. All right, Mr. Resch, since that Old Santa Fe Wasteway has been closed there hasn't been any water diverted by that wasteway from the Franklin Canal into the river, has it?

A. No, sir.

Q. Not a drop, so far as you know?

A. There might be a drop of leakage that I don't know.

Q. Now, formerly there were substantial quantities of water diverted at the Franklin Canal Settling Basin into the river from the American Canal, were there not?

A. Under the required type of operation, most assuredly.

Q. None has been diverted there recently except when the canal could not carry the volume of water coming down the American Canal, has it?

A. I believe I testified that during this period of water shortage that we had not used those wasteways extensively.

Q. Well, now, you haven't used it to divert any water into the river except where the Franklin Canal didn't have the capacity to carry the water coming down the American Canal, have you?

A. No, no, that is not exactly right.

Q. Well, have you been running the water down the river recently?

A. Well, we did put water in the river within the last two or three weeks as a result of a request received from the City of El Paso.

Q. You put it in yesterday too and the night before, didn't you?

A. I wouldn't know, for the last two or three days.

Q. You know whether or not they had a flash flood down from Hatch in the last 72 hours?

A. Yes, sir. There was some arroyo water in the river during the last 48 hours.

Q. Then you did put some water into the river, didn't you? During that period of time, and that came by the treatment plant?

A. I would assume that some water was put in the river, yes.

Q. And it is a fact that the Franklin Canal wouldn't carry the volume of water coming down, isn't it?

A. The Franklin Canal, in the lower end, down to Leon Street, is in a very bad condition as a result of accumulated sludge from the City Water Treatment Plant that we have not been able to sluice out of that section of the canal.

Q. It is always in a bad condition on account of the sand there because you have not diverted, used it as a settling basin, that Franklin Canal Settling Basin.

lately, you have not used it as a settling basin wasteway except a very small time?

A. It was due to the severe water shortage.

Q. And that has caused the Franklin Canal to pile up with sand in places?

A. Only in part. Another part is due to the sludge that is put into the canal from the City Water Treatment Plant.

Q. Now, wouldn't it be a fair statement, Mr. Resch, to say that you only put water in the river and have only put water in the river during the last couple of years where the water was of larger quantity than the Franklin Canal could reasonably carry?

A. If the water in that volume is present that would be a fair statement, but I don't know whether that wasteway was used once a week, twice a week, or not at all during the week

Q. Is there anybody in your office that has that information?

A. No, sir.

Q. Nobody that you know of has that information?

A. No, sir. We have never found it necessary in the operation of the Project to maintain records on those wasteways.

Q. Now, Mr. Resch, under normal conditions water did come here by the treatment plant, didn't it?

A. Under normal conditions?

Q. Yes, sir. I mean by normal conditions before we had drouth conditions?

A. Yes. It is safe to assume that at certain periods there was water flowing down the river

Q. Well, even in the month of January, which was a minimum month, was it not, ordinarily speaking?

A. January is a non-irrigation month

Q. Even during that month there was as much as 150 cubic feet per second flowing down the river, wasn't there?

A. That figure sounds familiar. I don't recall the exact figures.

Q. And that would amount to 97 million gallons of water every 24 hours, wouldn't it; 150 cubic feet per second would amount to 97 million cubic feet of water every 24 hours, wouldn't it?

A. I don't know. I haven't made that computation.

Q. I mean gallons, 97 million gallons?

A. I would accept your computation.

Q. Does it sound reasonable to you?

A. I don't know.

Q. Now, Mr. Resch, you have given us a lot—

A. I would rather not try to make a mental calculation of a figure that goes up into the millions.

Q. I believe in your testimony originally you testified, "Question: Well, the average flow between Caballo and El Paso measured at El Paso. Answer: At El Paso in past years, during the month of January, which is accepted as the low month of the year, the river rarely ever dropped below 150 cubic feet per second." You remember that testimony?

A. Yes, sir. I think I said that figure was familiar.

Q. Yes, sir. Now, counsel asked you if you didn't mean when you spoke of El Paso, as water coming down the American Canal. Well, when you gave that testimony the American Canal wasn't in El Paso, was it?

A. What year was that?

Mr. Edwards: [illegible]

That wasn't what I asked him, if the Court please. [illegible] I said at all.

Q. Well, at any rate, the water you were asked about was the water coming down the river at El Paso, wasn't it?

A. I don't recall the question.

Q. Another question they asked you, they said, "And normally if there is any water it would be very little in the river at all?" And you said, "Not under normal conditions."

A. That is correct.

Q. Not under normal conditions. We are talking about normal conditions now. We are not talking about drouth conditions. Under normal conditions there were substantial quantities of water coming down here by this water treatment plant down the river, isn't that right?

A. Yes, sir. That is a fair assumption.

Q. And even in the month of January there is 150 cubic feet coming down there, a flow of 150 cubic feet per second, under normal conditions I am talking about now, isn't that right?

A. There is no question about that.

Q. Now, how much water do you put out at the Riverside Heading—that Riverside Heading is down below the water treatment plant, isn't it?

A. Yes, sir.

Q. That is where you now divert water from the Franklin Canal into the river, isn't it?

A. I don't understand the question.

Q. No, I am sorry. I will withdraw that question. I want to ask you about the Lower Street Wasteway. That is where you now divert water from the Franklin Canal into the river, isn't it?

A. That is one point, yes, sir.

Q. That is the first point at the present time, isn't it, the first point below the American Dam, isn't it?

A. No, that is not true.

Q. Well, you have cut out the Santa Fe Wasteway?

A. Yes, but the wasteway and the settling basin is still available for use and has been opened recently.

Q. But only very rarely, isn't that right?

A. This past year and this year, that is correct.

Q. Most of the time you can walk down there without getting anything but dust on your shoes, isn't that true?

A. That is absolutely true this year.

Q. Now, what I am trying to find out, how much water do you divert there out of the Leon Street Wasteway, do you know how much water you divert?

A. To the river?

Q. Yes, sir. Substantial quantities?

A. During the current year I don't think it would be too difficult to determine that except for this complication, that is, determining the amount of water flowing in that segment of the river; we have had numerous flows out of the Mexican arroyos this year coming into the river below the American Dam and that is added to those flows; and for that reason it would be very difficult to determine the amount of water that passed down that segment of the river.

Q. During normal years a substantial diversion took place up there at the Franklin Canal basin wasteway, didn't it?

A. Normal—in normal years, that is true.

Q. But it hasn't during these abnormal years?

A. Not to the extent that it is the case in the normal years.

Q. Well, there has been very little water during these abnormal years?

A. I don't know how much water we have diverted.

Q. You know that lots of times you can walk up and down that river and get dust on your shoes most any month in the year by the water treatment plant?

A. I don't know about any month of the year, but it has been true a great part of this year.

Q. A great part of the time?

A. Yes, sir.

Q. And you would say that is not a normal condition, wouldn't you?

A. I would say that I hope that the present drouth conditions are not a normal condition.

Q. Now, Mr. Resch, what you are telling the Court here in your direct testimony is that as far as you are concerned there is no practical way to measure the water that has been going down by the water treatment plant during the past years, isn't that right?

A. There is no accurate or near accurate way.

Q. That you know of?

A. That I know of.

Q. But, on the other hand, you do tell the Court that in normal years substantial quantities of water did go down the river by the water treatment plant, isn't that right?

A. I think that a review of the records clearly indicates that.

Q. And you are further telling the Court that even in January, which was the minimum month, as much as 150 cubic feet per second of water went by that water treatment plant down the river, even during that low month, isn't that right?

A. The records will indicate that.

Q. And that is your belief?

A. No, it is not my belief. I know it.

Q. It is your knowledge?

A. Yes, sir.

Q. Now, Mr. Resch, according to your map, Exhibit 153, where it says "Riverside Canal Heading", that, I believe you said, was a dam, known to an ordinary layman as a dam?

A. Yes, sir. You can refer to it as a dam.

Q. A diversion dam would be a more accurate statement?

A. Yes, sir.

Q. Now, who was that built by?

A. By the Bureau of Reclamation.

Q. Now, the effluent comes down the river, this effluent from the City comes down the Rio Grande River, doesn't it, until it hits that heading or that diversion dam, is that correct?

A. Yes, sir.

Q. And then that can be and is in fact in substantial quantities diverted into the Franklin Canal?

A. No, sir.

Q. You say no part is diverted by that Riverside Canal into the Franklin Canal?

A. Part of that sewage effluent at that point is not diverted into the Franklin Canal. It is diverted into the Riverside Canal.

Q. Well, it goes into the Riverside Canal and that flows back into the Franklin Canal further down, doesn't it?

A. At a point several miles down the canal.

Q. Don't your arrows—look at the arrows in your map there (indicating), don't they show that some of the water coming out of the Riverside Canal Heading, or the river at that point, does go up into the Franklin Canal, according to your arrows?

A. Yes, but it is diverted from the river into the Riverside Canal.

Q. But some of it, though, goes according to your arrows into the Franklin Canal?

A. It is co-mingled.

Q. Into the Franklin Canal?

A. Through the Franklin Feeder.

Q. Well, you told Counsel that you couldn't separate it, there is no way known to man to separate it?

A. That is true.

Q. Then part of the effluent goes up into the Franklin Canal for irrigation purpose and part of it goes down into the river, isn't that right?

A. From that standpoint, yes, but it is not diverted from the river into the Franklin Canal.

Q. But it gets down into the Franklin Canal as a result of the Riverside diversion dam?

A. A part of it eventually.

Q. Yes, sir. How do you determine how much water you are going to get into the Riverside Canal Heading if you don't measure the water up here at the Franklin Canal Settling Basin?

A. We determine that from the amount of water that is reported to us as being available in the American Canal.

Q. Then you put it all in the Franklin Canal and just measure the Franklin Canal?

A. The water is measured at the head of the American Canal and then it is measured in the Franklin Canal down the canal from the Leon Street Wasteway.

Q. How do you determine how much to waste into the river, Mr. Resch?

A. We try to operate the Franklin Canal, when the water is available, in flows of from 300 to 350 cubic feet per second.

Q. In other words, you only divert from the canal when it won't reasonably carry it?

A. I beg your pardon?

Q. You only divert from the canal when the Franklin Canal won't carry the volume? At the present time you only divert water from the Franklin Canal when the Franklin Canal won't carry the volume?

A. That is true.

Mr. Grambling:

That is all.

Questions by the Court:

Q. Mr. Resch, I notice on your table of canal capacities on this exhibit (indicating), the first segment, let me say, of the Franklin Canal would seem to have a larger carrying capacity than that part of the canal below Leon Street?

A. Yes, sir. That is true.

Q. Is the canal itself in that first segment simply larger?

A. It is larger and it has the greater grade, that is, the fall is greater than it is in the canal below Leon Street.

Q. Do you know about the dimensions of the canal in that first segment, the width and the depth?

A. Oh, if you will permit me to make an estimate I would say that the water surface width of the Franklin Canal above Leon Street is probably around forty feet, maybe a little bit more; and below Leon Street perhaps twenty-five or twenty-six feet. The depth above Leon Street in the Canal, when it is not filled up with sands and silts, can be as much as nine or ten feet, especially in the last mile of the Canal Below Leon Street, the depth probably would

not exceed four feet, and I give that figure approximately.

Q. The first gage shown on this plat or map that was installed by the Project authorities, as I understand it, is the one that is labeled "American Canal Gaging Station", or was that put in by the Commission?

A. By the Commission.

Q. That was put in by the Commission?

A. Yes, sir.

Q. And then the map shows the "Franklin Canal Gaging Station", and was that gage put in by the Project authorities or by the Commission?

A. By the Project.

Q. Well, then, Mr. Resch, would it be correct to say that whatever quantity of water is gaged at the American Canal Gaging Station, it should be the same quantity gaged at the Franklin Canal Gaging Station except say for factors of evaporation and except for the water that is wasted into the river between those two gages?

A. And in addition to that, the water that is diverted from the Franklin Canal into the City Treatment Plant.

Q. Yes. And making those allowances, then, the quantity first gaged at the American Canal Gaging Station is the same quantity, as reduced by the factors just mentioned, that would later be gaged at the Franklin Canal Gaging Station?

A. Less those factors that you mentioned?

Q. That's what I said.

A. Plus those factors that you mentioned.

Q. Plus or less?

A. Plus. If I may, Your Honor, if you add the water at the Franklin Canal Gaging Station and the

water diverted into the City Treatment Plant and the unknown quantities from the three wasteways, you should have the same volume of water as you have at the American Canal Gaging Station.

Q. All right, that is getting at it the other way around, and it is the same thing. We surely understand it now. Now, in past years, as I follow the testimony, there have been three wasteways between those two gaging points?

A. Yes, sir.

Q. And in the recent period of time there have just been two?

A. That is correct, the recent period of time since January, 1954, when we closed the Santa Fe Wasteway.

Q. Yes. How wide is the American Canal where it reaches the settling basin there, near the junction of the American Canal and the Franklin Canal?

A. I again, your Honor, will have to make a mental estimate of that because I don't have those figures with me. I would assume that the top width across the surface of the water, when the canal is flowing twelve hundred cubic feet per second, it is in the neighborhood of twenty or twenty-five feet. That canal has a very very large grade, even more of a grade than the upper end of the Franklin Canal, and as a result of that excessive grade, the same type or the same dimensions of cross-section were not necessary. In other words, the water moved faster with an excessive grade.

Q. You testified, I believe, that water would bring in some silt and dirt with it?

A. Yes, sir.

Q. And the object of this settling basin is to sift out that material and flush it back into the river?

A. Yes, sir.

Q. And that is a very necessary procedure, I take it, in the sensible operation of the Project?

A. Absolutely necessary. And in the past years of the Project, in spite of the silting operation from the settling basin in the upper end of the canal down to the Leon Street Wasteway sufficient sands and silts passed on down into the canal system, to the point that we have had to put machinery and scrapers in the canals in the winter time in order to excavate the accumulated silts, the water capacity had been reduced so much by those silts and sands.

Q. During the years 1950 to 1954 inclusive, were you using this Fraklin sluiceway there at this settling basin regularly.

A. No, sir. I wouldn't say regularly because we haven't had the volume of water in 1951, 1952, 1954 and '55 that would permit us a normal type of operation through those wasteways; consequently the use of the upper wasteways of necessity has been less than prior to this current period.

Q. Well, do you mean that that started back as early as 1950?

A. No, 1951, 1952, '54 and '55.

Q. During that period of time had you made use of the Leon Street Wasteway?

A. Yes, sir.

Q. Have you used that at slow pace like you say you did the Franklin Wasteway or have you done it at an accelerated rate?

A. No, sir. The operations at that point have also been slow because we have not had the water. The main control point is at Leon Street. As a matter of fact, we keep a man stationed there during the daytime and during the irrigation season also at night.

and that is the main control point, but in recent years, during this critical water shortage, our operations have been below normal not only in the Franklin Wasteway but at Leon Street.

Q. When you speak of "control point" do you mean a point for getting the water distributed for irrigation or are you talking about getting the dirt or silt out of the water?

A. No. The control point is necessary for this reason: Above El Paso we irrigate about one hundred thousand acres, and we have coming in off of that irrigation distribution system approximately somewhere between twenty-five and fifty wasteway returns to the river. Those wasteway operations create a fluctuating condition in the river. The river may rise for several hours and then go down for several hours, and then as other wasteways come into the picture, why, it may go back up for several hours, with the result that the El Paso Valley here has to take all of those fluctuations that have developed in the river, so in order to iron those fluctuations out and not pass those down into the Franklin Canal we have set out a control point at the Leon Street Wasteway and those men in attendance there—constant attendance—as these fluctuations pass through the American Canal and into the upper end of the Franklin Canal they attempt to smooth them out at the Leon Street Wasteway by passing that excess into the river when it rises. Of course, when it drops, if we have waste water at the time that drop is occurring going through the Leon Street Wasteway, then he reduces his waste in order to try to smooth out the flow in the Franklin Canal.

Q. Why couldn't you smooth it out just as well at the Franklin sluiceway there at the settling point?

A. Well, the experience through the years has been that we could not return to the river a sufficient amount of the sand and silt that came in at that point, so we'd set that gate when it was necessary opened half a foot, or a foot, or a foot and a half, and then the man would leave that settling basin wasteway and travel down to the Leon Street Waste way and maintain the control at that point so that we could get the benefit of additional movement of silts and sands to the river in addition to having the control point.

Q. But in opening the Franklin wasteway there at the settling point you flush out silt in that manner, wouldn't you?

A. Yes, sir, but we wouldn't move out a sufficient amount. That has been our experience through the years.

Q. Well, you had a larger opening there, didn't you?

A. Yes, sir, but we still had to get water down the Franklin Canal and in getting that water down the Frankln Canal your silts in suspension, when they come up against the barrier they develop a spiraling motion and they will go up and over and into your canal, they go out over the top of what we call the sand weir and pass on out in the canal; consequently, in order to keep that out of the Franklin Canal as much as possible then we had to have these other wastewavs from which we could return more silts and sands to the river.

Q. Well, now, the way you have done it of late in putting more emphasis on the Leon Street Wasteway, haven't you done that at the cost of piling up more silt in that upper region of the Franklin Canal?

A. More silt is piling up to the extent, I think it was two years ago this January, that we had to move a dragline into that section of the canal between Leon Street and the settling basin wasteway and scoop sands and silts out.

Q. Well, is't that partly due to the fact that you haven't used the Franklin wasteway as freely as you used to?

A. Yes, sir, but that is because we haven't got the water. The Franklin wasteway structure is not as easily operated as the Leon Street structure.

Q. Why?

A. Better type of gear and gate construction. And for the reason that I just gave you a moment ago. We can't get all of the sand and silt out of the settling basin. If we tried that by throwing the water out to the river at that point under these low flows then we wouldn't have anything to come out into the Franklin Canal.

Q. Now, are you saying or not, I am not sure exactly about but of late, and particularly in the past three or four years you have been flushing more water out the Leon Street Wasteway than out the Franklin Wasteway?

A. We don't know what the actual records are but under the operation pattern that does appear to be the case of necessity.

Q. You run more water out where the canal is only about 25 feet wide and rather shallow than you do down there where it is much wider and deeper?

A. No. The Leon Street Wasteway takes the water off of that section of the canal where I think I estimated that the width of the water surface is about forty feet.

Q. It is part of the forty feet?

A. Yes, sir, and then immediately below this Leon Street structure we come into the narrower section of the Franklin Canal.

Q. All right. Now then, you say you don't have any gages on either of those wasteways, the Franklin or the Leon?

A. Not for record purposes, except as I explained that we had put some in this year for investigation. We have not been able to develop any records from it.

Q. Was that investigation in connection with this litigation?

A. No, sir, not exactly. As a matter of fact, we wanted to see what could be done. Now, from that standpoint, you may say that it was the result of this decree, especially what we have been doing up there the last three or four weeks.

Q. Now, Mr. Resch, you have been with the Reclamation Project here how many years? A long time, I know.

A. Yes, sir, I have been here since January or February of 1925.

Q. You are familiar with every foot of it, are you?

A. Almost.

Q. Well, now, do you have any opinion about whether in these last few years we are talking about there has been more water released through the Franklin Wasteway than the Leon Street Wasteway, or would you say more through the Leon Street Wasteway than the Franklin Wasteway?

A. I would have to just give you an opinion, Your Honor, because we don't have any records on which to base an opinion.

Q. All right.

A. I would assume that during this period of water shortage knowing what we have to do we have returned more water to the river from the Leon Street Wasteway than from the other structure.

Q. About how would you rate the proportion?

A. Well, sir, you got me now. I don't know.

Q. You would have some opinion about it, wouldn't you, Mr. Resch?

A. I don't know, Your Honor, whether it would be one and a half, or twice, or two and a half.

Q. And was there ever a time when you would think that the proportions would be reversed?

A. Yes, in the early days of the Project, prior to construction of the American Dam, when we were trying to operate without a night man, it is quite possible that we used the upper wasteway more under those conditions, but that was between about 1926 'til about 1935, probably right in the depression, but as soon as we could get away from that we got away from it in a hurry because it was very very unsatisfactory.

Q. How far back do you think you would have to go to find a time when the two wasteways were somewhat on an equal basis?

A. Well, Your Honor, I can't hazard a guess.

Q. I mean, do you think there has ever been a time when about equal quantities were discharged through those two wasteways?

A. I just wouldn't know. We don't even attempt to keep an estimate day to day of the water that passes through those wasteways. I just can't answer that.

Q. Let me say to you I am not talking about the record. Of course, if I thought you had a record then we would try to do it more accurately, but taking the

situation with its drawbacks, I have assumed that with your close familiarity with the whole thing that you would have at least some rough estimate in mind about the use of these two wasteways?

A. No, Your Honor. I am sorry but I just can't make an estimate. Unfortunately, my training is technical and we are very cautious about estimates.

Q. Well, is it your present opinion that in the last five years there has been twice as much water wasted through the Leon Wasteway as through the Franklin Wasteway, approximately?

A. I think, Your Honor, that during 1951, '52, '54 and '55, that there has been more water passed to the river from the Leon Street Wasteway than from any of the other two or combinations of them.

Q. Well, would you think that it might be as much as twice as much?

A. I just don't know. I just don't know.

Q. Well, would you think it wouldn't be more than twice as much?

A. I just wouldn't know that.

Q. And you don't think about it at all?

A. We have been doing, as I explained a few minutes ago, we have even been trying to make some efforts in the last two or three or four weeks to find out what was going on up there but unfortunately we ran into difficulties with the gage we installed, and I have been doing a lot of pencil work personally and I just haven't been able to come up with any estimates.

Q. Would you still be stumped in having any opinion as to whether it would be five times as much through the Leon wasteway as the other?

A. Well, now we are getting up into the sphere that as to my knowledge of the Project I would have to

say that I don't think physically it could be five times.

Q. Well, what limit would you put on it physically?

A. Well, I can't technically, Your Honor, I just don't know.

Q. Well, don't misunderstand me. I am not asking you for something that you could vouch for to a certainty, just your best judgment about it?

A. Well, as I explained, we have never made any effort to keep even an estimate of any kind and consequently it is impossible to hazard a guess because the guess could be so wrong.

Q. Mr. Resch, is it true that if these waste discharge quantities that I have been asking you about were settled by an approximation that then you would have no difficulty in computing the quantity of water that went by the City Treatment Plant?

A. Well, I think that if some formula was developed based on an approximation we would then be working against an approximation at all times and we would be able yet to determine the flows that pass down that segment of the river in question, so we would have the formula set up and the approximation but nevertheless we still couldn't determine for checking purposes against that formula the flows that went down the river.

Q. Well, but if you worked on the hypothesis that a certain percentage of the water which was lost between the American Canal Gaging Station and the Franklin Canal Gaging Station went out at the Franklin Wasteway and another percentage of it went out at the Leon Wasteway, then you would have no difficulty in determining the quantity of water that was passing down the river; affected of course by any infirmities in the estmates?

A. Yes, Your Honor. That would be, however, a paper computation.

Q. A what?

A. A paper computation, and would not be indicative of the actual conditions.

Q. Well, you see, don't you, that that is all that stands in the way of conforming with that part of the Court's decree?

A. Yes, sir. I have made every effort in the world to try to determine that base flow in there and I have been unable to do it.

Q. When was the Franklin Canal Gaging Station installed by the Project?

A. Our first gage records are available in 1914. That is the year the canal was being reconstructed.

Q. The equipment, of course, has been changed?

A. Yes, sir, on several occasions.

Q. Now, what are the impediments about the results attained with these staff gages?

A. The ones that we have been experimenting with?

Q. Yes?

A. We couldn't determine from the staff gage, what we refer to as the tail water gage, that is, the elevation of the water surface, the jet issuing from under the bottom of the gate; now, the gate is discharging water under pressure and with a staff gage we couldn't make a close determination on that tail water elevation; not being able to do that we couldn't determine the head that was producing that flow under the gate. In addition to that we installed a recorder on the Franklin Canal [illegible] below the wasteway here (indicating), and the velocity got so high in there during the increase in the canal that it skewed the recorder out of place and made the

record, of course, not of any value. In other words, we got a false record while the gage was bending over almost diagonally. We do know from that staff gage operation that it wouldn't be satisfactory and we would have to put in at least two automatic recorders on each gate, that is, at the settling basin wasteway and also at the Leon Street wasteway in order to record the difference of the water elevations acting on the gate, and we would have to make numerous current meter gagings in order to establish what we refer to as a discharge coefficient, that is, a coefficient taking into consideration all factors of distribution, and so forth.

Q. In your previous testimony I got the impression that you set a gage at that settling basin position or the Franklin wasteway location, I have forgotten which, that might also do for the purposes of the Leon Street wasteway without an additional gage at that point?

A. If we could determine the flow of the two wasteways, if we could determine the flow from one we could then estimate the flow from the other, but to do that and do it right it is going to require the expenditure of some funds. Now, in order to get the discharge of one wasteway it would mean that we would actually have to reconstruct the wasteway. Instead of having a mere gage there inside of the gate, inside of the wall, we might have to put in a flume section, if we could get the proper type of meters or the effective type of meters that could operate under the velocity that we have there.

Q. Let me hear what you have to say again about the Southside Feeder Canal?

A. The Southside Feeder Canal at the present time diverts water from the Franklin Canal, and any

residue of water left after taking care of the irrigations along the canal is discharged in the Riverside Canal. Originally, the Southside Feeder Canal was conceived as a main feeder canal for what was then known as the San Elizario Canal and lateral system, but later the Riverside Canal was substituted to a major extent for the old San Elizario system but the Southside Feeder Canal then continued to discharge a smaller amount of the water into the Riverside Canal than had originally been planned.

Q. All right. The map assists quite a bit in understanding the layout of things better. Mr. Marshal, recess Court now until 1:30.

At this point a recess was had from 12:00 o'clock Noon until 1:30 o'clock P.M. the same day, at which time proceedings were resumed as follows:

(The witness, Mr. Resch, resumed witness stand.)

Questions by the Court (Cont'd):

Q. Mr. Resch, one other question I want to ask you. You would have no difficulty, I presume, in getting access to the records in respect to the gage readings at any of these places where there are gage installations that are not in charge of or owned by the Reclamation Bureau?

A. No, sir. The records are always made available to us, but there is considerable delay in getting records at times, particularly when we have to get them from the records section of the Boundary Commission.

The Court:

All right. Any more questions?

Mr. Edwards:
Yes.

On Re-Direct Examination.

Questions by Mr. Edwards:

Q. Mr. Resch, in response to some questions by the Court, and possibly in connection with this map too, you made some statements about fluctuations in the daily flow of the main canals of the El Paso Valley in the Rio Grande Project occasioned by a number of different things including, I believe, a return flow from a hundred thousand acres of land up the valley and also in connection, I think, with some tables of averages on the map. I will ask you whether or not your office staff, under your supervision, has prepared a set of hydrographs of the daily flow of the main canals of the El Paso Valley, 1945 to 1954, of the Rio Grande Project?

A. Yes, sir.

(At this point an instrument was marked for identification as Plaintiffs' Exhibit Number 154.)

Q. Mr. Resch, is this Plaintiffs' Exhibit 154 the matters to which you refer, the graphs showing these various things, the fluctuations?

A. Yes, it is.

Q. Will you please go through it and explain to the Court what the graphs show and their connection with the fluctuations in the American Canal and the other canals, and also as applied to these tables on Exhibit 153, which is a schematic map?

A. In my testimony this morning in explaining the tables relative to canal capacities on the map I

pointed out that you could not always place too much reliance in an average figure for the reason that as we have established these averages here they are based on using the full number of days in the month regardless of whether the flow was zero during the month or some appreciable figure. I also testified this morning that as a result of the operation of the Project for the approximately one hundred thousand acres of land above El Paso the fluctuations were created in the river and that these fluctuations were caused by the operations of these twenty-five to fifty wasteways, and that consequently the El Paso Valley found it necessary to absorb all of those river fluctuations in the distribution system in the El Paso Valley. Now, these graphs will portray those fluctuations. If we take the year 1945, which is the first graph in the exhibit, the uppermost graph is the average daily flow in cubic feet per second of the American Canal, and it may be noted the large ups and downs in the daily flow. The second graph on the sheet is the daily flow of the Franklin Canal. Now, from the control point at the Leon Street Wasteway it may be noted that we are able to smooth out a great part of the fluctuations that enter at the head of the American Canal. We do that by controlling at the Leon Street Wasteway and consequently maintain a somewhat even flow daily in the Franklin Canal. The last graph is of the Riverside Heading and indicates that there are major daily fluctuations at that point but as a result of passing the water on down the river there has been a slight smoothing effect with the result that to some extent there has been a slight smoothing in the Riverside Canal although it is still far from satisfactory from the standpoint of a smooth continuous operation. The main point is that

the fluctuations that have to be taken in the canals and distribution system of the El Paso Valley is given graphically by each of these graphs and again points up the desirability of maintaining a control such as we have been doing at the Leon Street Wasteway for purposes of smoothing out these fluctuations as much as possible. Now as a comparison between the volume of flow in 1945 and in 1954 we may turn to the last graph in the exhibit. The effect is striking. It may be noted that the flow in the American Canal in 1954 is considerable less than it was in 1945, and likewise the flow in the Franklin Canal was considerable less than it was 1945, and the same may be followed as to the Riverside Canal. The graphs in themselves, taken year by year, will show the operation difficulties inherent in the tail end of an irrigation system and point up the necessity of maintaining, where possible, control points to try to smooth out the fluctuations.

Mr. Edwards:

You may take the witness.

On Cross Examination.

Questions by Mr. Grambling:

Q. Mr. Resch, you mentioned the fact when the Court was interrogating you this morning that the Leon spillway was to get rid of some of the silt in the river and you say now it helps to straighten out the curve there of the water in the Franklin Canal. As a matter of fact, that Leon Street spillway is kind of a safety valve for you because the Franklin Canal, according to your chart here, has a capacity of 800 second feet per minute while the American Canal has

the capacity of 1200 second feet per minute, doesn't it?

A. Well, that is true and all of the wasteways are used in addition to control of silt, to pass the flow that the Franklin Canal cannot carry back to the river.

Q. And, of course, you couldn't accomplish everything in that Franklin Canal basin the Court inquired about by diverting the water there that you are accomplishing by diverting it at the Leon Street wasteway?

A. No, sir, I don't think—

Q. The only objection I gathered from the testimony was that the water got into a swirl and more of a sediment went up over and into the Canal?

A. That is right, but if we were trying to pass all of the excess water out of the Franklin Canal Settling Basin we would find ourselves in difficulty in trying to pass sufficient water down through the upper Franklin Canal for use in the lower Franklin Canal.

Q. Now, Mr. Resch, will you look here at this Exhibit 153. Now, that Leon Street Wasteway is only two-tenths of a mile from the River Pumping Plant in the river put in there by the City of El Paso, isn't it?

A. That figure sounds reasonable without verifying it.

Q. And it is only four-tenths of a mile from the El Paso Water Treatment Plant, isn't it?

A. Three or four tenths.

Q. And you just got that Leon Street Wasteway just beyond the facilities of the City of El Paso, the way it stands today, haven't you?

A Correct.

Q. You don't know of any reason why it couldn't have been put just up the river that distance, could you?

A Oh, yes, sir, I certainly do. It is at that point there that the Franklin Canal turns away from the river and that is the appropriate spot to put your final wasteway for control, both water control and for de-silting purposes.

Q. Would it be so bad to put it four-tenths of a mile higher up the river?

A. Well, now, four-tenths of a mile probably wouldn't make much difference, but remember this, that wasteway was placed there as early as 1889 and certain rebuilt there in 1914.

Q. And, of course, up to a few years ago you were using this Franklin Canal Settling Basin Wasteway, you were using that extensively up to a short time ago, a few years ago?

A. Yes.

Q. And were also using the Old Santa Fe Wasteway, which is about half a mile above the treatment plant, weren't you?

A. Yes, sir, above the plant.

Q. Mr. Resch, may I ask you—you don't need to answer this question unless you want to—did the fact that the Santa Fe Wasteway was North and above the treatment plant, did that have anything to do with you in discontinuing its use?

A. Absolutely nothing at all.

Q. It just happens that all the wasteways above the treatment plant have been discontinued?

A. No. You must remember this, the canal system has been there before, long before, the treatment plant and the river pumping plant, and we have been operating now for many many years prior to the construction of the City's facilities.

Mr. Grambling:
That is all.

On Re-Direct Examination.

Questions by Mr. Edwards:
Q. It was the City and not the Bureau of Reclamation that chose the site for the City Water Treatment Plant, wasn't it, Mr. Resch?
A. That is correct.
Q. And the City Water Treatment Plant was built in 1943 and the Leon Street Wasteway had been there for many many years before that time?
A. That is correct.

Mr. Edwards:
We offer in evidence Plaintiffs' Exhibit Number 154

Mr. Grambling:
No objection.

(Plaintiffs' Exhibit No. 154 was thereupon received in evidence by the Court, but same is not suitable for being copied and is to be forwarded to the Court of Appeals as an original exhibit upon order by the trial Court.)

Questions by the Court:
Q. Mr. Resch, looking back on the Exhibit 154, I notice that the sheet covering the year 1945 depicts what would seem to be a good job of smoothing out the flow in that upper part of the Franklin Canal, is that the way you would describe it?
A. Yes, sir.
Q. Now then, turning to 1946, there is a pattern somewhat similar but not quite as good as in 1945?

A. Yes, sir, that is true.

Q. And turning to 1947, the pattern is about on a par with that of 1946, isn't it?

A. Yes, sir.

Q. Now, turning to 1948, the pattern gets rather rough, doesn't it?

A. There is not as much smoothness as in the prior years. You will note, however, that the difference in 1948 is principally due to a considerable drop in the discharges, which is also available in the American Canal, which was also evident in the American Canal.

Q. Now turning to 1949, it is a pattern about like 1946, isn't it?

A. Yes, sir.

Q. Turning to the 1950 page, the pattern is what you might say fairly good?

A. Yes, sir.

Q. Now turning to 1951, you reach another bad year, don't you?

A. Yes, sir. That was our first low water year.

Q. You mean that was why you couldn't smooth it out any better?

A. No, sir. By that I meant that that is the reason why we did not have as much water in either the American Canal or the Franklin Canal as in prior years.

Q. Then turning to 1952, that is not so good as several of the other years, is it?

A. No, sir.

Q. And turning to 1953, it becomes quite erratic, doesn't it?

A. Yes, sir.

Q. What is your explanation about it this time?

A. Well, if you will notice in the American Canal, the flow in the American Canal is also quite erratic.

particularly in April, May, early June, late June, mid-July, and about the third week in August.

Q. And then turning to the page for 1954, it is the most erratic of all?

A. That is due to the critical water shortage.

Q. So far as that upper part of the Franklin Canal is concerned, in dealing with the fluctuations due to these drainage increases in the upper valley, why couldn't you use the Santa Fe Wasteway just as well to regulate those fluctuations in that part of the Franklin Canal?

A. As I previously explained, we don't get enough sluicing activity out of the settling basin with the result that we have to operate the lower wasteway. Now, if it was not a question of control, the control was not involved at all, that is, in smoothing out the flows in the Franklin Canal, we would still maintain the sluicing activity at the Leon Street Wasteway as a major sluicing point, and in addition to that, since 1943 we have had to keep closer control down at the Leon Street Wasteway in order to maintain water elevation for diversion into the City of El Paso Water Treatment Plant.

Q. Well, now back to my question and that is: Thinking only of the problem of relieving the upper part of the Franklin Canal from these water fluctuations that come down the American Canal, why couldn't that be done just as well, just as logically, at the Santa Fe Wasteway as at the Leon Street Wasteway?

A. It could be done up there, Your Honor. We probably would have to reconstitute the grate structure there to get the same type of fingertip control that we have down at the Leon Street Wasteway, but it would not be as satisfactory as maintaining the

control at Leon Street on account of the necessity of using that long segment of canal there as an additional basin for movement of sands and silts. Were we to attempt to pass all of the excess water out of the Franklin Canal Settling Basin we would have difficulty in maintaining flow over the skimming weir in that basin for passing water on down the Franklin Canal for use in the Franklin Canal system. I think this morning that I explained that we had tried to do that in the late '20's and early '30's, possibly during the depression period, due to economic reasons, but that we found out it was not satisfactory and as soon as we could get back to complete control at Leon Street we moved back down there.

Q. The way I gather from your testimony is that you have more of a pitch, I would call it, the American Canal has more of a pitch than the Franklin Canal so that the situation is rather good for increased water velocity at the Franklin Wasteway, is that correct?

A. Yes, sir. The pitch or grade in the American Canal approaches five feet to the mile and that is a very excessive grade. In the Franklin Canal below the Franklin Canal Settling Basin the grade tapers from about three feet to the mile down to approximately two feet to the mile, and then in the lower Franklin Canal below Leon Street Wasteway it drops to about a foot and seven-tenths to the mile; so we start out of the American Canal or through the American Canal with an excessive grade, meaning that the American Canal is bringing to us all of the sand and silt out of the river and we've got to take care of it in our settling basin and then our Leon Street Wasteway. There is no stopping of it in the American Canal at all on account of the high velocity.

Q. Well, what I am getting at is that you have the requisite conditions for a strong water velocity there at the Franklin Wasteway?

A. Yes, sir. Subject to one condition—

Q. Well, maybe you will get to that in my question coming up next. Now, you have made some explanation, and I am not sure that I have gotten it right clearly, as to why you think that the Franklin Wasteway isn't the best place for flushing the water back into the river.

A. Well, if we assume that we are going to operate so that we do all of the sluicing from the Franklin Canal Settling Basin and at the same time make an effort to keep silts and sands from spiraling over into the water that is being carried for the Franklin Canal then we are in trouble because through the years we know definitely that the sands and silts flow up and over the weir at the end of the settling basin into the Franklin Canal. Now, if we were using all the water available for wasteage at that upper point then all of the sand and silt that spirals over the weir would be carried right down into the Franklin Canal System. We would have no other opportunity to move part of it back to the river.

Q. Well, I follow that all right, but that does not say as far as I can tell that there might not be good use for the Franklin Wasteway as the main sluicing point and the Leon Wasteway to serve as an auxiliary place for sluicing or flushing out the sand and silt that gets by the Franklin Wasteway?

A. Yes, Your Honor, but we tried that in the late 20's and 30's, in the depression period, and it wasn't a satisfactory type of operation, so then we immediately went back to the same type of operation that we have been using since about 1935 and '36: that is,

we moved back down to the Leon Street Wasteway as a control point.

Q. Do you say then that the settling basin and the Franklin Wasteway are an engineering mistake?

A. No, sir. I wouldn't say that. Silts and sands are a great difficulty in all of the Western projects, particularly the projects in the Southwest, such as the Rio Grande, Salt River Valley, and the projects along the Colorado River. Along the Colorado River the Bureau of Reclamation spent millions of dollars some years ago in trying to effect a mechanical de-silting works, and in spite of the fact that I think it was somewhere around ten million dollars that they put into these so-called de-silting works, it still did not effectively control the silt problem in connection with the canal leading off the Colorado River.

Q. Do you say that your established practice had become to use the Leon Street Wasteway as this control point, to use your language, more than ten years ago?

A. Yes, sir, in 1935, and prior to that. I don't recall the exact year, but when we first went into the depression. That was about 1929 or 1930. We were having difficulty, the farmers on the Project were having difficulty and we had to reduce our budget, and also a reduction in personnel. We therefore laid off the day man and the night man at Leon Street Wasteway and moved the control up to the settling basin and tried to operate there for several years. Now, prior to this 1929 and 1930, and I am not certain about that date, the control point had always been at Leon Street Wasteway.

Q. Would you say that as between the Franklin Wasteway and the Leon Street Wasteway that probably the discharge at the Leon Street Wasteway has

been greater than at the Franklin Wasteway year by year and certainly for the last ten years?

A. Well, the only thing positive that I know about that is that this year it certainly has been more but in prior years I honestly don't know.

Q. Whether it has been more or not?

A. No, sir.

The Court:

All right. Any more questions?

Mr. Grambling:

No more, Your Honor.

Mr. Edwards:

No more from us.

(Witness excused.)

The Court:

All right, call the next witness

Mr. Edwards:

We rest.

R. L. LOWRY, was recalled as witness by the Defendant, and testified further as follows:

On Direct Examination.

Questions by Mr. Grambling:

Q. Mr. Lowry, state your name.

A. R. L. Lowry.

Q. You have testified heretofore in this suit, have you?

A. Yes, sir.

Q. And I believe you are a Water Engineer, is that right?

A. Yes, sir.

Q. You were here with the International Boundary Commission at one time?

A. That is right.

Q. And you now operate a consulting engineer water office in Austin?

A. Yes, sir.

Q. Mr. Lowry, at my request have you made a calculation to determine how many gallons of water would pass a point in twenty-four hours if the flow was 150 cubic feet per second?

A. Yes, sir.

Q. How much is that?

A. It is about ninety-seven million gallons per day.

Mr. Grambling:
That is all.

Mr. Edwards:
No questions.

(Witness excused.)

HARLAN H. HUGG, was recalled as a witness by the Defendant, and testified further as follows:

Mr. Grambling:
Your Honor, I have some photographs here but I haven't been able to get copies of them. I submit them to counsel. (Shows same to counsel.) Your Honor, I believe these photographs will supplement

the map that has been put into evidence. They are aerial photographs of the same area and I will have them marked by the reporter.

(Several photographs were then marked for identification as Defendant's Exhibits Numbers 81, 82, 83, 84 and 85.)

Questions by Mr. Grambling:

Q. Mr. Hugg, I hand you here an exhibit which has been marked as Defendant's Exhibit Number 81. Will you tell us what that is?

A. This is an aerial photograph taken by Larry Darst of the sewage effluent outlet into the river at the East part of El Paso.

Q. I hand you an exhibit entitled "Defendant's Exhibit 82". Will you tell us what that is?

A. That is a portion of a series of aerial photographs taken by the Texas Highway Department through the Barnes Aerial Surveys, and they show in main the area that is covered by the map here; the American Dam, the American Canal, the Mexican Dam, and the Mexican Canal, the three spillways, the Treatment Plant, and the River Intake Plant.

Q. They have all been marked on this map in ink?

A. Yes, sir. They have all been marked as shown by the picture. That picture is looking West from the City.

Q. Mr. Hugg, I hand you Defendant's Exhibit 83 and ask you to tell us what that is.

A. This is a picture of the same area looking East, mde by the same people, the Barnes Aerial Surveys, and it shows the mountains in the Pass, the American Canal, the American Dam, and the Mexican Dam, and the Mexican Canal, and the beginning of the Franklin Canal.

Q. And it is all marked on there?

A. Yes, sir.

Q. I hand you Defendant's Exhibit 84. Will you tell us what that is?

A. That is a close-up view also of the same group of pictures by Barnes Aerial Surveys, made in July, 1953, showing the American Canal, the Rio Grande River, the Mexican Dam, the spillway at the beginning of the Franklin Canal, and the Franklin Canal, and the abandoned spillway, the River Intake Plant, the Treatment Plant, and the Leon Street Wasteway.

Q. They are all marked in ink, are they?

A. Yes, sir.

Q. This is looking East, I believe?

A. Yes. That is looking slightly South and to the East.

Q. I hand you Defendant's Exhibit No. 85. Will you tell us what that is?

A. This is a view looking almost straight down on this same area, right at the immediate end of the American Canal, and the beginning of the Franklin Canal. This shows the spillway up to the beginning of the Franklin Canal, with water spilling out of it, and the area of the Rio Grande River down there almost to the Treatment Plant. It is a closer view of the same area.

The Court:

On Defendant's Exhibit 82 you have an indication for "abandoned spillway." Would you say that was the Old Santa Fe Wasteway?

The Witness:

Yes, sir.

Mr. Grambling:
We offer these photographs in evidence.

Mr. Edwards:
No objection.

(Defendant's Exhibits 81, 82, 83, 84 and 85 were thereupon received in evidence and same are to be transmitted as original exhibits to the Appellate Court by order of the trial Court.)

Mr. Grambling:
That's all.

The Court:
Any questions?

Mr. Edwards:
No questions.

(Witness excused.)

Mr. Grambling:
The Defendant rests.

Mr. Edwards:
The Plaintiff closes.

Mr. Grambling:
The Defendant closes.

OPINION OF THE COURT.

(Filed August 2, 1955.)

In the United States District Court for the Western District of Texas, El Paso Division.

El Paso County Water Improvement District No. 1 L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers, together with the United States of America, Plaintiffs,

vs. Civil Action No. 1409

City of El Paso, Defendant.

This suit primarily is a contest over the rights to the waters of the Rio Grande River in the vicinity of El Paso, Texas, but along with that are a cluster of satellite controversies. The frame of the principal dispute is that the plaintiffs, El Paso County Water Improvement District No. 1, a political subdivision of Texas, together with some individuals owning land in said district, and the United States of America, contend that the waters in question have been committed to the needs and uses of a federal reclamation development, lying partly in New Mexico and partly in Texas along the river, including the territory of plaintiff district, and known as "The Rio Grande Project", under senior appropriations made by the government in the Territory of New Mexico, and a senior appropriation in Texas assigned to the government, but the defendant City claims that it has a priority of some measure in such water as a riparian land owner, and also by appropriation rights under a permit issued by the Board of Water Engineers of

Texas, as well as other ways. The ramification of details will be supplied later, as the opinion moves from one part to another of the law suit.

Rio Grande Waters.

The Rio Grande is not only a river of song and story, but also a symbol of the Spanish heritage in what is now the American Southwest. It is the second longest river in the United States and is the only river of this country having long segments first wholly within this nation and next forming an international boundary. The physical aspects of the river, as it stretches through hundreds of miles of arid territory, make an environment quite unlike the rivers of humid climes and verdant lands such as England or the eastern seaboard of this country, where the doctrine of riparian water rights is dominant. The full strength common law riparian rule in a nutshell is, "the river runs, let it run on and on". The Rio Grande was not made for such a riparian law world. It has never been dependable navigable in fact on any general scale within the span of history, except to a limited extent in the lower reaches of the river. Obviously, by the order of nature, it was destined for use in irrigation of the valleys along its banks and it has been such a life line for hundreds of years. The Indians first and the Spaniards next began such use of the river. The acequias of the Spaniards go back to the 17th century. The community of Ysleta, a few miles south of El Paso, is among the oldest settlements of the kind.[1] The

[1] Hutchins, "The Community Acequia: Its Origin and Development"—Southwestern Historical Quarterly, 31: 261-284 (1928).

riparian rights principle has never been recognized in New Mexico and has been strictly modified in Texas, but appropriative water rights are in the law of both States. The clash between the two kinds of water rights and property, particularly in the western half of the United States, is familiar history, but more of such comparative water law later.

The Reclamation Act was approved June 17, 1902,[2] and in 1905 Congress authorized the Rio Grande Project.[3] In 1906 the government, acting by a Supervising Engineer of the Reclamation Service in the Department of the Interior, in conformity with a statute of the Territory of New Mexico,[4] filed a written claim to appropriate 730,000 acre-feet per year from the unappropriated waters of the Rio Grande at the later site of the Elephant Butte Dam, to serve the Rio Grande Project; and in 1908 similar notice of claim was filed by the government, but this time to take all of the unappropriated water of the Rio Grande and its tributaries, for the same use above specified, in conformity with a later statute of the Territory of New Mexico.[5]

[2] 32 Stat. 388, (43 U. S. C. Ch. 12).

[3] Act February 25, 1905, 33 Stat. 814.

[4] Law of 1905, Section 22, Chap. 102, 36th Legislative Assembly of the Territory of New Mexico.

[5] The notice aforesaid reads in material part as follows:

"Claiming and reserving all rights under our former notice of January 23, 1906, * * * I do now hereby give you the following notice, in addition to said former notice and supplemental thereto.

"The United States acting under authority of * * * the Reclamation Act * * * proposes to construct within the Territory of New Mexico certain

In 1880 some desultory correspondence in diplomatic channels began between the United States and

---

irrigation works in connection with the so-called Rio Grande Project. The operation of the works in question contemplates the diversion of the water of the Rio Grande River.

"Section 40, of Chap. 49 of the laws enacted in 1907 by the 37th Legislative Assembly of the Territory of New Mexico, an act entitled: 'An Act to conserve and regulate the use and distribution of the waters of New Mexico; to create the office of Territorial Engineer; to create a Board of Water Engineers and for other purposes' approved March 19, 1907, reads as follows:

'Whenever the proper officers of the United States * * * shall notify the Territorial Engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated * * * shall not be subject to a further appropriation under the laws of the Territory for a period of three years from the date of said notice, within which time the proper officer of the United States shall file plans for the proposed works in the office of the Territorial Engineer * * * and no adverse claim * * * initiated subsequent to the date of such notice shall be recognized under the laws of the Territory. * * * Provided, that in case of failure to file plans * * * as herein required, the waters specified in the notice * * * shall become public water, subject to general appropriations.'

"In pursuance of the above statute of the Territory you are hereby notified that the United

Mexico over mutual grievances about the diversion and use of Rio Grande waters in the vicinity of El Paso, Texas, and Juarez, Mexico, and was renewed in 1894, growing more persistent all the time, until it was finally resolved by a Treaty, or Convention, between the United States and Mexico, of May 21, 1906.[6]

The planning of the Rio Grande Project, and the settlement of differences with Mexico went hand in hand. The integration of the Project and the Convention is manifest from the first two articles of the Treaty.[7]

States intends to utilize the following described waters to-wit:

"All the unappropriated water of the Rio Grande and its tributaries, * * *

"It is therefore requested that the waters above described be withheld from further appropriation and that the rights and interests of the United States in the premises be otherwise protected as contemplated by the statute above cited."

[6] Simsarian, "The Diversion of Waters Affecting the United States and Mexico", Texas Law Review, Volume XVII, No. 1, page 27.

[7] "Article I. After the completion of the proposed storage dam near Engle, New Mexico, and the distributing system auxiliary thereto, and as soon as water shall be available in said system for the purpose, the United States shall deliver to Mexico a total of 60,000 acre-feet of water annually, in the bed of the Rio Grande at the point where the head works of the Acequia Madre, known as the Old Mexican Canal, now exists above the City of Juarez, Mexico.

"Article II. The delivery of the said amount of water shall be assured by the United States and

The Congress appropriated funds for the construction of the Elephant Butte Dam, as the main unit, or facility, of the Project, in 1907, and thereafter the work progressed from stage to stage, taking a number of years, until completed. The total costs have been over $20,000,000.00.

The Legislature of Texas in 1913 enacted a comprehensive act [8] regulating the water resources of Texas and providing for an administrative Board of Water Engineers. This statute made it necessary for holders of old water right appropriations under earlier laws to file a certificate thereof, as well as certain specified information, with the newly created Board of Water Engineers. In 1914, the United States, by its Project Manager of the Rio Grande Project, made such certified filing in compliance with said law in respect to the declaration of water appropriation filed by Loomis and others in 1889, and later acquired by the United States, (as again mentioned

> shall be distributed through the year in the same proportions as the water supply proposed to be furnished from the said irrigation system to lands in the United States in the vicinity of El Paso, Texas, according to the following schedule, as nearly as may be possible:
>
> • • • • • • • •
>
> "In case, however, of extraordinary drouth or serious accident to the irrigation system in the United States, the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States."

[8] General Laws, Regular Session of the 33rd Legislature, Chap. 171.

hereafter) but a reservation of all rights was inserted in said certified filing."

The United States, as owner of the physical works and facilities of the water storage and irrigation system built and being built to serve the Rio Grande Project, and the El Paso County Water Improvement District No. 1, thereunto duly authorized, signed a contract dated January 17, 1920, covering improvements and irrigation service for District lands as a component part of said Project and, by the terms thereof, the said District became obligated to pay the United States a maximum of nearly $5,000,000.00 in reimbursement for its proper part of the construction costs for the works, facilities and irrigation system to be used in carrying on the functions of the Project, and previously a somewhat similar contract, dated January 7, 1918, had been executed between the United States and the Elephant Butte Irrigation District of New Mexico; and lands within that District were thereby made the other component part of said project. A few months after the first contract mentioned, the said El Paso County Water Improvement District No. 1 was enlarged by consolidation with another

" The language of such reservation reads as follows:

"For the purpose of information and in compliance with the provisions of Chapter 171, General Laws of the State of Texas, 33rd Regular Session of the Legislature, so far as may be, but without waiving any rights of the United States, or its successors in control of any of the works hereinafter mentioned, by reason of this compliance with said provisions this statement is made by and on behalf of the United States of America * * *"

district and thereafter the additional lands, coming from said consolidation, were also brought into said project by agreement with the United States.

On March 18, 1938, the states of Colorado, New Mexico and Texas, by their duly appoint[illegible] Commissioners, "desiring to remove all causes of present and future controversy among these states and between citizens of one of these states and citizens of another state with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas," executed a compact, signed by said Commissioners respectively, and also signed for approval by the duly appointed representative of the United States. The compact was ratified by Colorado February 21, 1939,[10] by New Mexico March 1, 1939,[11] and by Texas March 1, 1939,[12] and was approved by the United States May 3, 1949.[13]

Article I of the Compact enumerates several definitions and the ones presently most material are quoted in the margin.[14]

quoted in the margin.[14]

[10] Laws 1939, Chap. 146.

[11] Laws 1939, Chap. 33.

[12] Acts 1939, 46th Legislature, Special Laws, p. 531.

[13] Public Act No. 96, 76th Congress, 53 Stat. 758.

[14] "'Project storage' is the combined capacity of the Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of 2,638,860 acre-feet."

"'Usable Water' is all water, exclusive of credit water, which is in project storage and which is

Article II designates stream guaging stations.

Article III defines the obligation of Colorado to deliver water at the Colorado-New Mexico state line

Article IV defines the obligation of New Mexico to deliver water into the Elephant Butte Reservoir at San Marcial, New Mexico, (which is some 125 miles above the point where the river leases New Mexico and becomes the International Boundary between the United States and Mexico.)

Article VIII has material bearing and is set out in the margin.[15]

---

available for release in accordance with irrigation demands, including deliveries to Mexico."

"'Credit Water' is that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both."

"'Actual Release' is the amount of usable water released in any calendar year from the lowest reservoir comprising project storage."

"'Actual Spill' is all water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled."

[15] "During the month of January of any year the Commissioner for Texas may demand of Colorado and New Mexico, and the Commissioner for New Mexico may demand of Colorado, the release of water from storage reservoirs constructed after

Articles IX, X, XI, XII, XIII, XVI and XVIII are immaterial in this controversy, but the remaining two Article, Articles XIV and XV, are pertinent and will be found in the foot note.[16]

An application by the City of El Paso, dated September 23, 1948, was filed with the Board of Water Engineers of Texas on November 1, 1948, for a permit to appropriate, store and divert 27,000 acre-feet

1929 to the amount of the accrued debits of Colorado and New Mexico, respectively, and such releases shall be made by each at the greatest rate practicable under the conditions then prevailing, and in proportion to the total debit of each, and in amounts limited by their accrued debits, sufficient to bring the quantity of usable water in project storage to 600,000 acre-feet by March first and to maintain this quantity in storage until April thirtieth, to the end that a normal release of 790,000 acre-feet may be made from project storage in that year."

[16] "Article XIV. The schedules herein contained and the quantities of water herein allocated shall never be increased, nor diminished by reason of any increases or diminution in the delivery or loss of water to Mexico."

"Article XV. The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby, and to the development thereof, have actuated this Compact and none of the signatory states admits that any provision herein contained establishes any general principle or precedent applicable to other interstate streams."

of water per annum "of the unappropriated storm and flood waters of the State of Texas, and the unused return flow water of the Rio Grande Project of the Bureau of Reclamation of the Department of the Interior, for municipal and domestic use, from the Rio Grande in El Paso County, Texas."

It was proposed to impound 16,000 acre-feet per annum in a storage reservoir and to take the remaining 11,000 acre feet per annum by direct diversion of return and flood waters without the use of storage. The City's plan, as outlined in said application, definitely relied upon making use of the American Dam, (located only about 100 feet upstream in the Rio Grande from the intersection of the International Boundary Line between the United States and Mexico with the river) and the American Irrigation Canal and the Franklin Canal, all property of the United States, although the City at that time had no authority or agreement from the United States to so use such government facilities for carriage of any water under its requested appropriation permit to the City water plant. (The City, later in a contract dated August 10, 1949, between it and the plaintiff District, approved by the United States, did stipulate for such use of the government's works and facilities, subject to certain conditions, but the City now assails the validity of that contract.) The United States, joined by the El Paso County Water Improvement District No. 1, as protestants, filed opposition to said application for water permit and the grounds, after being detailed fully, were summarized in such protest.[17]

[17] The summary, which is sufficient to make the issues clear, reads as follows:

"It is therefore respectfully submitted to the Board:

The Fort Quitman Land Company, the owner of farming lands on the south of the Hudspeth County Conservation and Reclamation District No. 1, and also several owners of lands in the last mentioned district, also filed their protests against the City's application. The interest of said District, adverse to the City, resulted from a contract, dated December 1, 1924, between the United States and the District, executed under the authority of the Warren Act of

"(a) That there are no unappropriated waters in the Rio Grande subject to appropriation by the City of El Paso;

"(b) That the proposed use by the City conflicts with the existing water rights appropriated by the United States for and on behalf of the lands of the Rio Grande Project, which are now and long since have been applying said waters to beneficial use, and on behalf of lands in Mexico, rights to which are in pursuance of an existing treaty between the United States and the Republic of Mexico;

"(c) That the granting of a permit under the application made by the City without any contract or other means of determining relative rights of the City and those of the Rio Grande Project water users and of the Hudspeth County Water Conservation and Reclamation District No. 1 under Warren Act contract with the United States, and water users of Mexico under treaty between the United States and the Republic of Mexico, and of other inchoate rights in the stream under permits issued by your Board, will be detrimental to the public welfare."

February 21, 1911,[18] wherein the Government agreed to deliver to the District at the terminus of the Tornillo Main Canal in the Rio Grande Project, each irrigation season, "such water from the Project as may be available at said terminus without the use of storage from Elephant Butte Reservoir", for use in irrigation, in other words, the left-over water from the Project. The City and the various protestants finally made an ostensible settlement of their contest, precipitated by the application of the City for a water permit, and the key to such settlement was the aforesaid contract executed in the meantime on August 10, 1949, (to be fully noticed later) as shown by copy attached to a separate stipulation, signed by the parties under date of December 1, 1949, and filed with the Board of Water Engineers. In said stipulation the protestants withdrew their opposition to the City's application, but this action was qualified by an express reservation and condition.[19]

[18] 36 Stat. 925 (U. S. C. Title 43, Sections 523-5).

[19] That part of the stipulation is here quoted:

> "The rights of the City of El Paso under the terms of such permit as this Honorable Board shall see fit to grant in these proceedings, shall stand expressly conditioned by and made subject to the terms and conditions of that certain contract between the City of El Paso, applicant, and the El Paso County Water Improvement District No. One, hereinabove referred to, copy of which is attached hereto, marked for identification Exhibit 'A', as such contract has been interpreted, and as so interpreted approved by the Secretary of the Interior in his letters referred to in Article IV hereof."

On May 10, 1950, The Board of Water Engineers of Texas granted the City's application by a permit order, without making any mention therein, however, of the settlement between the parties, which was reflected in the signed stipulation then on file with the Board. On the other hand, the previously mentioned contract of August 10, 1949, was the only possible antecedent to justify the directions in said Permit for the use of works and facilities belonging to the United States in the service of the City. Enough of the Permit for an understanding thereof is herein quoted.[20]

[20] "Now, therefore, the Board of Water Engineers, * * * grant this permit unto the said City of El Paso, * * * to divert, appropriate and use * * * an amount of the public waters of the State of Texas, not exceeding 27,000 acre-feet per annum, to consist of the unappropriated or unused storm, flood and return waters of the Rio Grande in El Paso County, Texas, * * or so much thereof as may be necessary, * * * when beneficially used, for supplying the municipal and domestic needs of the said City of El Paso and its residents, the appropriation and diversion of such waters to be effected in the manner following:

"(a) The City of El Paso shall have the right hereunder to impound not to exceed 16,000 acre-feet per annum of said total of 27,000 acre-feet per annum in a storage reservoir, to be constructed * * * about 13.8 miles upstream from the American Dam, and located on the west side of the Rio Grande, * * * the water so stored to be released into the Rio Grande as needed by the City; and

"(b) The City of El Paso shall have the right hereunder to appropriate and use not to exceed

The national government, in cooperation with the Republic of Mexico, [21] has undertaken and completed an immense program of rectification to shorten the channel of the Rio Grande by many miles between El Paso and Fort Quitman. The State of Texas ceded to the United States all of its right, title and interest in the bed and banks of the Rio Grande in El Paso County and Hudspeth County, which were within the range of said rectification work.[22] Later, the United States also has carried out canalization of the river, between Caballo Reservoir and the American Dam, under the authority of Congress.[23] The rectification was not but the canalization is an irrigation adjunct. Several miles of El Paso river front lies between their termini at the edge of Cordova Island and at

11,000 acre-feet per annum of said total of 27,000 acre-feet per annum, by direct diversion of return and flood waters, without the use of storage, such waters to be diverted from the Rio Grande at the American Diversion Dam, * * and conveyed through the American Irrigation Canal and the Franklin Canal to the City's water treating plant, where it will be rediverted from the canal to the plant, or said water, or any portion thereof, may be diverted directly from the Rio Grande at the water treating plant, through facilities provided, or to be provided, by the said City of El Paso, Texas."

[21] Convention, or Treaty, of February 1, 1933, 48 Stat. 1621.

[22] Act of September 22, 1934, 43rd Legislature, 3rd Called Session, Ch. 5, p. 29.

[23] Joint Resolution of February 13, 1935, 49 Stat. 24. Act of August 29, 1935, 49 Stat. 961. Act of June 4, 1936, 49 Stat. 1463.

the American Dam a few miles above El Paso. These works, one up and one down river from the City, do not seem truly material to the present litigation.

This brings the discussion to the grounds in support of the conflicting claims herein to the waters of the Rio Grande. The plaintiffs' main contention, in brief, is that the constituent land owners in the Rio Grande Project territory, pursuant to the water appropriations made by the United States in New Mexico and the Loomis appropriation in Texas, (a later subject herein), have acquired a vested right to the water in question, superior to any claims made by the defendant City, and, moreover, that the State of Texas by legislation has subordinated its laws governing water rights to the irrigation program of the Project. In contrast the defendant City takes the position that Rio Grande water entering Texas, even though same is being handled by the United States for the Project, becomes subject to the laws of Texas and that under such law the defendant, as a municipality, has a superior appropriation right to such water for domestic and municipal requirements. Riparian rights are also claimed.

The plaintiffs rely heavily on the language in the Reclamation Act that Project water "shall be appurtenant to the land irrigated",[24] but that provision must be construed consistently with another section

[24] U. S. C. Title 43, Section 372:

"Right to the use of water acquired under the provisions of the Reclamation Law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

of the Reclamation Act, upholding the force of State laws.[25]

This respect for the state laws was no casual policy, as the same pattern is found in the Federal Power Act,[26] and again in the Ferris Public Lands Bill, H. R. No. 408, 64th Congress, First Session,[27] and

[25] U. S. C. Title 43, Section 383:

"Nothing in this chapter shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such and nothing herein shall in any way affect any right of any State or of the Federal Government, or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

See parallel stature: 16 U.S.C.A. Sec. 500x-1(b).

[26] 41 Stat. 1063, as amended: 49 Stat. 838 (16 U.S.C Section 821):

"Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses or any vested right acquired therein."

[27] "Sec. 13. That nothing in this act shall be construed as affecting or intended to affect, or to in any way interfere with the laws of any state relating to the control, appropriation, use, or distribution of water."

again somewhat similarly in the Warren Act,[28] and the Flood Control Act of 1944.[29]

Such consistent purpose to avoid disturbance of state authority makes it very doubtful that the fact water rights in a reclamation project become "appurtenant to the land irrigated", renders such water rights immune to state law, which, without attempting to nullify such water rights, simply declare same

---

[28] Act of February 21, 1911, 36 Stat. 925 (U. S. C. Title 43, Section 524):

"In carrying out the provisions of the reclamation law, the Secretary of the Interior is authorized, * * * to cooperate with irrigation districts, * * * for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts.' * * Provided, that nothing contained in this or the preceding section shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State"

[29] Act of December 22, 1944, Ch. 665, 48 Stat. 887:

'In connection with the exercise of jurisdiction over the reservoirs of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States * * * in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; * * *"

inferior and subject to the priority of higher uses of the water fixed by the state law. The water right under the Reclamation Act is in the nature of property and, broadly, is a vested right,[30] although it just as well fits other terms,[31] since, after all, the statute declares that "beneficial use shall be the basis, the measure, and the limit of the right". In other words such water right, unlike a fee simple title, is not a fixed and absolute estate, but, instead, is a defeasible interest, which never comes to rest, but is always at the risk of loss by unjustifiable delay in making or continuing beneficial use thereof. These water rights, however denominated, in any event are subject to the restraints in the Reclamation Act, and it is beyond reach to reconcile their finality as asserted by the plaintiffs with the integrity of the state law.

The proposition has been settled in litigation of state against state in the Supreme Court, to determine their relative rights in the waters of an interstate river, that the upstream state has no right to appropriate all of the water and let the downstream state go empty-handed.[32] If, in this instance, the appropriation filed years ago by the United States in the Territory of New Mexico should render that part of the water taken thereunder, which finds its way into Texas, untouchable by the policy of water rights and appropriations under the law of Texas, then, indeed, New Mexico has practically captured all of the

[30] Ickes v. Fox, 300 U. S. 12.

[31] Washington v. Oregon, 297 U. S. 517, ("Privilege"). Federal Power Commission v. Niagara Power Corp., 347 U. S. 239, 246, ("Usufruct").

[32] Wyoming v. Colorado, 259 U. S. 419, 466. Kansas v. Colorado, 206 U. S. 46.

waters of the Rio Grande upstream and excluded Texas from exercising any free control over same in its own way, and that cannot be justified in law, unless it has been done by the sovereign consent of Texas. This must be so if there is any tangible reality in the provision leaving the state laws intact under the terms of the Reclamation Act and any thought that such proviso was an empty gesture has been rejected several times by the Supreme Court.[33]

The Federal Court, Southern District of California, where prolonged litigation, with some factual similarity to this suit, is pending, has rendered an opinion much in point.[34]

The plaintiffs' counsel move to somewhat stronger ground in saying that Texas has consented to the priority of water use for irrigation in the Rio Grande Project, as certain statutes of Texas do point in that direction,[35] but still are not explicit enough to settle the question.

[33] U. S. v. Gerlach Livestock Co., 339 U. S. 725; Nebraska v. Wyoming, 325 U. S. 489, 612-15; Nebraska v. Wyoming, 295 U. S. 40, 43; California Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142, 163-4; Silas Mason Co. v. Tax Commission, 302 U. S. 186, 204-7.

[34] Rank v. Krug, 90 Fed. Sup. 773, 799.

[35] Revised Statutes of Texas 1925, Title 128, contains two articles as follows:

"Art. 7587. When, in the examination of any such irrigation or reclamation project, under the provisions of the Act of Congress, known as The Reclamation Act, approved June 17, 1902, it shall be found advisable or necessary to irrigate or

The plaintiff District has contracted an obligation and indebtedness to the United States of the kind described in the last mentioned statutory article, and presumably the continuance of irrigation therein at the usual level is necessary for the orderly self-liquidation of the enterprise, so that any inroads in the name of a higher priority under the Texas law, which substantially depletes the water for irrigation in said District, might well hinder or disrupt the entire project.

The plaintiffs' position is not impaired by two statutory articles of Texas, one of which is strongly

> reclaim lands within the limits of the State, the Secretary of the Department of the Interior is authorized to make all necessary examinations and surveys for, and to locate and construct irrigation or reclamation works within this State, and to perform any and all acts necessary to carry into effect the provisions, limitations, charges, terms and conditions of such Reclamation Act."
>
> "Art. 7622. The County Commissioners Court of any county in this State * * * may establish * * * water improvement districts * * * in the manner hereinafter provided. * * Such districts may be formed for cooperation with the United States under the Federal Reclamation Laws for the purpose of the Construction of irrigation works, including drainage works, necessary to maintain the irrigability of the land for the purchase, extension, operation or maintenance of constructed works or for the assumption, as principal or guarantor, of indebtedness to the United States on account of district lands."

relied on by defendant (certainly not if the second of such articles is constitutional), and same are quoted in the margin.[36]

The defendant's counsel strenuously argue that said Article 7472a is unconstitutional.[37]

[36] Revised Statutes of Texas 1925:

"Art. 7472. As between appropriators, the first in time is the first in right; provided, however, that all appropriations or allotments of water hereafter made for hydro-electric power, irrigation, manufacturing, mining, navigation, or any other purposes than domestic or municipal purposes, shall be granted subject to the right of any city, town or municipality of this State to make further appropriations of said water thereafter without the necessity of condemnation or paying therefor, for domestic and municipal purposes, * * * any law to the contrary notwithstanding."

"Art. 7472a. The provisions of Section 2 of this Act (Art. 7472) shall not apply to any stream which constitutes or defines the international border or boundary between the United States of America and the Republic of Mexico."

[37] "Article 7472a, which attempts to state that the public policy of the State of Texas, as set forth in Articles 7471 and 7472, giving municipalities the right to make further appropriations of water already appropriated is abrogated and is unconstitutional without question. There certainly is no difference in human beings in cities on the Rio Grande and those living elsewhere within the State upon other streams. It is elementary that where the classification in a statute is without reasonable basis. The law is unconstitutional.

In the first place, constitutional guaranties, ordinarily, at least, are not designed to protect one arm of the state from the body of the state, but are to protect individual and corporate citizens against the state, or arms of the state. This principle is recognized not only by the Supreme Court of the United States,[38] but also in Texas, [39] as well as other states,[40] and is stated in the standard texts.[41]

Laying that consideration aside, it is not evident at all that the statute reflects any arbitrary discrimination, or repugnant classification. It has been in the statute books now for twenty-four years. Of course,

> * * * In our judgment, it is unthinkable that a different rule of priority should apply to water from the Rio Grande River, or to people living on the Rio Grande River than to water taken from other rivers located in the State of Texas. Is there any difference between the people living on the Rio Grande River and those living on the Colorado River, the Trinity River, the Brazos River, or any other river in Texas? No reason is even hinted at by counsel for plaintiffs where there was any class difference which would justify this distinction."

[38] City of Trenton v. State of New Jersey, 262 U.S. 182; Chicago v. Sturges, 222 U. S. 313.

[39] City of Beaumont v. Gulf States Utilities Co. 163 S. W. 2d 426.

[40] State v. Powers, 124 Tenn. 553, 137 S. W. 1110; Pederson v. City of Portland, 144 Ore. 437, 24 P. (2) 1031;

Chas. Hewitt & Sons Co. v. Keller, 275 N. W. 94

[41] 16 C. J. S. Section 300 et seq.

at this late date it would be difficult to reliably reconstruct the reasons which prompted its enactment, but a number of things, tending to bring the statute within the permissible discretion of the law-making body can be pointed out. The Rio Grande is the only international stream bordering on Texas, and since that brings into play interests and relations between nations, much of the control over the river and its waters must, necessarily, be left in the hands of the United States. The Republic of Mexico, as well as the United States, has interests at stake. The Rio Grande has been the subject of Conventions and Treaties between these nations. It is seen in this law suit that a portion of the waters of the river, in the upper part of its boundary segment, have been allocated to Mexico and the United States is pledged to make delivery thereof at a point opposite the defendant City. The International Boundary Commission of the United States and Mexico is entrusted with a measure of continuing supervision and cooperation in questions and plans pertaining to the Rio Grande. In short, Texas does not and cannot have a free hand with this particular river. The welfare of the people living in the valleys along the Texas side of the Rio Grande may be more closely tied to an agricultural economy dependent so wholly on irrigation than along any other river of Texas. This is enough to suggest, not so much that the statute was well advised, but that, at least it is not irrational. The article in question is held constitutional.

The strongest bulwark of the plaintiffs' suit, in the present respect is the Rio Grande Compact between Colorado, New Mexico and Texas. The relevant articles have already been quoted in a preceding foot-

note. This Compact has a number of peculiar provisions. For example, the water New Mexico must pass to Texas is delivered not where the two States meet, but at San Marcial, New Mexico, more than 100 miles above the point where the Rio Grande leaves New Mexico. This delivery is made into the reservoir of the Elephant Butte Dam, the principal structure of the Rio Grande Project. Some of this water eventually goes to Mexico. The Compact, instead of leaving the Texas share of the water open for disposition under the general water statutes of Texas, plainly directs same for irrigation in the Project. A rge part of the Project land are in New Mexico and, consequently, this water delivered to Texas goes to irrigate not only Texas lands, but also New Mexico lands in the Project. The apparent reason for all this is that when the Compact was negotiated, the Rio Grande Project, in all of its far flung works and physical properties was and for some time had been superimposed on the Rio Grande and its adjoining valleys all the way from the Elephant Butte Reservoir in New Mexico, to a point below Fabens in Texas and that fait accompli colored the whole Compact as between New Mexico and Texas. Perhaps the problem was handled in the only practicable way.

In any event, an analysis of the Compact shows convincingly that the water belonging to Texas is definitely committed to the service of the Rio Grande Project. This Compact is binding on Texas and the defendant City and, for that matter, is binding on the inhabitants and citizens of Texas.[42]

[42] Rinderlitei v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92

The Territory of New Mexico put in force the water appropriations made under its laws years ago for the intended use of the incipient Rio Grande Project, which, from the standpoint of New Mexico, meant more particularly what later became the Elephant Butte Irrigation District, and, naturally, New Mexico had no intention in the Compact that the water delivered at San Marcial should, in any event, all go downstream to Texas, with the result of leaving said local District waterless. Just as plainly, the United States never supposed that its physical works and facilities were to be put in service to handle that part of the water destined for Texas, only to have the Project lands deprived of it in favor of other uses under the law of Texas, thus, perhaps, imperiling the repayment program between the Project and the United States.

The defendant City insists, regardless of what else may be said, that it has a high statutory use for the waters of the river and is entitled to the first claim on same under still another article of the Statutes of Texas.[43] The defendant argues that this contention is sound whether or not Article 7272a, mentioned

[43] "Art. 7471. In the conservation and utilization of water declared the property of the State, the public welfare requires not only the recognition of uses beneficial to the public well-being, but requires as a constructive public policy, a declaration of priorities in the allotment and appropriation thereof; and it is hereby declared to be the public policy of the State and essential to the public welfare and for the benefit of the people that in the allotment and appropriation of the waters defined in Article 7467, * * * preference

above, is constitutional. Articles 7471, 7472 and 7472a are all derived from the same legislative Act and that helps in the proper construction thereof."

The plan of the whole Act seems to make it reasonably clear that Article 7471 simply regulates priorities prospectively in the subsequent issuance of appropriation permits, so that in acting on pending applications from time to time or in holding foresighted reserves preference will be governed by this statutory guide, but said article does not manifest any intention to upset the normal time priority of then or thereafter outstanding permits once duly issued. This distinction is made clear in Article 7472, which states that "the first in time is the first in right", but further provides as the only exception that appropriations of water "hereafter made" for any of the other

and priority be given to the following uses in the order named, to-wit:

"1. Domestic and municipal uses, including water for sustaining human life and the life of domestic animals.

"2. Water to be used in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, and to include water necessary for the development of electric power by means other than hydro-electric.

"3. Irrigation.

"4. Mining and recovery of minerals.

"5. Hydro-electric power.

"6. Navigation.

"7. Recreation and pleasure."

" Acts of the 42nd Legislature, General Laws, Regular Session, Chap. 128, page 217. (1931)

statutory purposes "shall be granted subject to the right of any city, town or municipality of this State to make further appropriations of said water thereafter without the necessity of condemnation or paying therefore, for domestic and municipal purposes as defined" in Article 7471. The defendant City, however, is in the class of municipalities denied the exceptional authority aforesaid by force of Article 7472a. In other words, the position of the defendant is not strengthened in this suit by the terms of Article 7471.

The defendant City presented record proof that acequias, an ancient thing along the Rio Grande, were still used in El Paso under town or city management to provide water for domestic and irrigation uses as late as near the turn of the century. On the other hand, it is also undisputed that the defendant City discontinued the use of river water for domestic and municipal purposes during all the time between dates in 1918 and 1943. The said acequias which served El Paso years ago brought water from the Rio Grande, but that hardly sustains any prescriptive or other present day right to the waters of the river. The acequia system of water supply, in its origins, evidently was appropriation in its simplest form. The river water was at hand, there was no hindrance, it was a necessity, and the early settlers simply helped themselves to satisfy common wants, just as they took the clay for making adobe. The question of whether any riparian aspect entered in during the years of the last century, when the acequias were still used in El Paso, is not definitely developed in the record. The record does show, however, that the original plat of the town of El Paso,

made in 1858, locates the townsite a half mile or more back from the river, but acequias are drawn in leading from the river into and across the townsite, and that spatial setting is, at least, consistent with the observation already made that the ancient acequias in the valley of the Rio Grande were works for a water use more akin to the appropriation practice than to riparian rights. Be that as it may, said acequia history, so far as is seen does not aid the defendant City.

The above discussion of the different claims of the defendant City comes to the conclusion that all of the appropriative water rights advanced by the City are either without reality or else must yield to the paramount disposition made by the Rio Grande Compact. The question whether there still might be some possible contingencies when the City would be entitled to appropriate waters of the Rio Grande will be reached at another place.

The other point, with present bearing, made by the City, is that of riparian rights. The two questions to settle at the outset are (1) what are riparian lands and (2) what are riparian waters. The Court in Richter v. Granite Mfg. Co., 107 Texas 58, 174 S. W. 284, L. R. A. 1916A. 504, quotes from a text book, as follows:

"All riparian rights depend upon the ownership of land which is contiguous to, and touches upon, the water: * * *. They do not attach to any lands, however near, which do not extend to the water: * * *."

In Motle v. Boyd, 116 Texas 82, 286 S. W. 458, the Court says:

"We are of the opinion that riparian waters are the waters of the ordinary flow and underflow of the stream, and that the waters of the stream when they rise above the line of highest ordinary flow, are to be regarded as flood waters or waters to which riparian rights do not attach. • • • 'The line of highest ordinary flow' is the highest line of flow which the stream reaches and maintains for a sufficient length of time to become characteristic when its waters are in their ordinary, normal and usual condition, uninfluenced by recent rainfall or surface run-off."

This declaration contracts the common law description of riparian waters. The quantitative measure of riparian waters, however, is not so important at this time as the limits to the uses of water by riparian. The statement in Texas usually included domestic, livestock and reasonable irrigation as proper riparian uses, and those are the more familiar uses, but that is not literally an exclusive enumeration. The question here is whether a large city, owning some riparian land, can bring a municipal water supply within the riparian rights fold.

The defendant City, in its propriatary capacity, owns a few hundred acres of land riparian to the river, and the principal tract thereof is being used as a drilling site, where a number of water wells produce a part of the water supply for domestic and municipal purposes in El Paso. Another of its riparian tracts is a tract used as the site of a water treating plant. A Texas Court has held that the city in that suit, a riparian owner, was entitled under the special circumstances, to take water it had impounded and supply it to the people of the city, in prefer-

ence to use by riparian owners for irrigation, but the city had acquired its tracts from certain riparian owners, who knew the specific purpose of the city was to impound a municipal water supply, as reflected by the deed, and a later contract about their correlative water rights had been made between the city and one of the defendants together with predecessors in title of the other defendants, and against that background the Court held the City's right superior to that of the defendants.[45] That decision, however sound in the light of the peculiar facts, might well be compared with a later case.[46]

Neither of the two cases just mentioned reflect any bread rule on the subject which would be controlling in this suit. The general rule is that the riparian rights of a city, owning land along a river, are no different from the rights of an individual owner, and cannot be expanded to justify the use of such rights as a nucleus for supplying and selling water in great quantities to the general public in said municipality, including mainly residents of non-riparian lands.[47] The law of riparian rights is allied peculiar-

[45] Grogan v. City of Brownwood, 214 S. W. 537

[46] City of Wichita Falls v. Bruner, 165 S. W. 2d 480 (Writ refused.)

[47] Parnell v. Henderson, 220 N. C. 79, 16 S. E. 2d 449; Stein v. Burden, 24 Ala. 130, 60 A. D. 453; Emporia v. Soden, 25 Kans. 588, 37 A. R. 265; Purcellville v. Potts, 179 Va. 514, 19 S. E. 2d 700, 141 ALR 633; Haupt's Appeal, 125 Pa. 211, 17 Atl. 436, 3 LRA 536; Lord v. Meadville Water Co., 135 Pa. 122, 19 Atl. 100, 8 LRA 202, 20 A. S. R. 864; Ferguson v. Hamburg, 272 N. Y. 234, 5 N. E. 2d 801.

ly with the interests of natural persons as owners of riparian lands, a particular advantage to those owning land with water frontage and the requirements that such lands must hug the stream well serves to stabilize the valuable benefits. A dominant distinction between riparian rights and appropriation rights is the principle of equality among riparians in contrast to the principle of time priority among appropriators. One of the tabulations in evidence shows that, over the last nine years, the City's take of river water has mounted. The average annual take for the three years beginning with 1946 averaged a little over 6,000 acre-feet. The average annual take for the next three years, beginning with 1949, was about 7,500 acre-feet. For the final three years, beginning with 1952 (the last 4 months of 1954 being estimated), the take averaged over 9,000 acre-feet. Of course, in that time the City has made long strides in growth. That amount of water equals only a small percentage of the total quantity going to the territory of the Rio Grande Project, but in most relations would be regarded as a large volume, and particularly in the ordinary riparian relationship. Such a withdrawal prima facie would seem to be out of focus with the principle of riparian equality. Many times the amount of riparian land owned by the City is owned by divers and sundry other proprietors in Texas along the river within the Rio Grande Project. This makes it manifest that the problem raised by the City is inseparably linked with the Project, if indeed the claim can have any footing in the face of the Rio Grande Compact.

The bearing of the Compact on either the appropriation or the riparian rights claimed by the City raises

a federal question,[48] and has been decided herein with respect to the first of such rights, but need not be determined with respect to the second thereof.

Another important distinction between riparian rights and appropriation rights is that the riparian's use measure of water is elusive and shrouded in the word "reasonable", more unknown than foreknown, while the appropriator's use measure of water is predetermined, at least the maximum. The city's riparian claim might, for the moment be regarded as sound theoretically, but at once there would come the baffling puzzle of evaluation and fitting it into the mosaic of the El Paso Valley. The present record, at least, seems unequal to such an intricate task. The only possible out in sight would have to be immersed in generalities, instead of being charted by any definite formula. That point is not reached, however, since the great weight of authority agrees that the pattern of riparian rights was never cut to fit the public water requirements of a large municipality.

Franklin Canal

In July 1889, one Loomis and five others acting under an "Act to Encourage Irrigation", enacted in 1889, the first such general statute of Texas, executed a written declaration appropriating out of the unappropriated waters of the Rio Grande a quantity equal to 333 cubic feet per second, which would be diverted through a projected canal 40 feet wide and 3 feet deep, named the "El Paso Irrigation Canal", to be laid out from a head gate on the river, through the town of El Paso along Eighth Street and thence south-

[48] Delaware River Joint Toll Bridge Commission v. Colburn, 310 U. S. 419, 427.

easterly with the general course of the river to Fabens, and the recited purpose was to carry such water "for irrigation and domestic use, and for mining, milling and stock raising", by all persons entitled thereto along the line of said canal. The El Paso Irrigation Company, assignee of Loomis and associates was granted a franchise and right of way 50 feet in width under an ordinance of the City of El Paso, effective July 6, 1889, for a term of 50 years, to construct and maintain the aforesaid canal for irrigation purposes through said city, subject to prescribed rates and any discrimination against customers in the city was prohibited. In 1912, the United States, acting under The Reclamation Act,[29] of the United States, by mesne conveyance, and for a consideration of $120,000.00, acquired the canal aforesaid, which in the meantime had become named the "Franklin Canal", together with rights of way, easements, irrigation facilities and structures, and other appurtenant interests and property. In 1905 Congress extended the Reclamation Act to include that part of Texas known as "The El Paso Valley" along the Rio Grande, and at the same time authorized the construction of the Elephant Butte Dam on the Rio Grande in New Mexico, to get under way with the Rio Grand Project.[30] Of course, the development took many years. The said canal and appurtenances were acquired, as aforesaid, in the progress of that project. In 1913, the City of El Paso amended the franchise ordinance of 1889 by naming the United States of America as the assignee and successor of the El Paso Irrigation Company, and reducing the width of the right of way on

[29] Act June 17, 1902, C. 1093, 32 Stat. 388, 43 U.S.C., Sections 371 et seq.

[30] Act February 25, 1905, 33 Stat. 814

Eighth Street (which is 70 feet wide as platted) from 50 feet to 25 feet and regulatory provisions, appropriate to the original ordinance in its nature as a franchise, were deleted.

The City Council of El Paso on November 9, 1939, passed and approved an ordinance entitled as follows:

"An ordinance amending an ordinance entitled: 'An ordinance conveying unto the United States of America all the right, title and interest of the City of El Paso in and to the right of way occupied by the Franklin Canal from, along, and across the streets, alleys and other public lands of the City of El Paso, with certain reservations and providing for a reverter when the said right of way is no longer used for canal purposes, and declaring an emergency', by inserting therein the clause 'contingent, however, upon approriations being made therefor by Congress', and declaring an emergency."

A quitclaim deed dated November 9, 1939, was executed by the City of El Paso to the United States of American pursuant to the aforesaid ordinance and The Reclamation Law of the United States. The defendant City now contends that said ordinance and quitclaim deed are both null and void, on the grounds that same were ultra vires, whether tested by its charter, the statutes or the constitution, without consideration and outside the purview of Article 5244a of the Revised Civil Statutes of Texas. This charter forms a special law of March 2, 1889, entitled "An Act to Incorporate the City of El Paso", enacted by the Legislature of Texas. The City's defense of ultra vires turns on the question whether it was without any power to do the act attempted by the ordinance

and quit-claim deed in question. The material parts of the pertinent sections in the charter are noted below as a footnote.[51]

[51] "Section 1. That all the inhabitants of the City of El Paso, in El Paso County, Texas, * * * shall constitute and continue to be a body politic and corporate by the name and style of the City of El Paso, * * * they shall be known by the same name in law and thereunder shall be capable * * * of contracting and being contracted with; * * * ."

"Section 2. The City of El Paso shall have power * * * to enact and enforce any and all ordinances upon any subject; * * *; it being intended by this act to grant to and bestow upon the inhabitants of the City of El Paso full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the State of Texas, or by the provisions of the constitution of the State of Texas."

"Section 37. No railroad company, * * * nor company of any kind, nor person, nor corporation, shall ever occupy or use the streets or public places of the City of El Paso for any purpose whatsoever without first obtaining the consent of the City Council evidenced by the ordinance duly enacted and no mere acquiescence or other act or omission of the City Council or city officers shall be held to confer by estoppel or indirection any such rights * * * ."

Section 56. The City Council shall have complete and exclusive control and power over the streets, alleys and highways of the City and * * * close, * * * sell, lease, * * said streets; provided, no

The charter provisions just noticed amply show that the defendant City had the essential powers to do what was done in this disputed transaction, subject to the condition that same is supported by a proper consideration. This comes to the element of consideration. The defendant City throughout its growth and particularly in the most rapid stage thereof, during the last twenty years, has drawn much support from its tributary agricultural economy, and that, in turn, has come to full development under the program of the Rio Grande Project. This factor is expressly recognized in the very words of the subject ordinance.[52]

This was a legitimate inducement to the defendant City in keeping with the decision evidenced by said

street shall ever be closed, sold or leased except for an adequate consideration, and not then except by a vote of at least three-fourths of the aldermen and the approval of the Mayor; * * *"

[52] The ordinance passed and approved November 9, 1939, in Section 1, as therein amended, recites as follows:

"Section 1. In consideration of the very great benefits conferred upon the city and county of El Paso and all of the residents thereof by the maintenance and operation of the Rio Grande Reclamation Project, furnishing water for the irrigation of land in the city and coutny of El Paso, and the further consideration that the maintenance and operation of what is known as the "Franklin Irrigation Canal" is indispensable to the carriage and distribution of said waters for irrigation purposes, * * *."

ordinance and within the spirit of the terms of its charter.[53]

The said canal was virtually unfenced at the time the ordinance was enacted in 1939, and as a part of the transaction it was the intent of the parties that the plaintiff Government would have the right of way fenced without expense to the City, and that feature of the agreement prompted a reference contained in Section 2 of the ordinance.[54]

In compliance with such understanding the Government spent, or caused to be spent, some $56,000.00 for such fencing with reasonable promptness after the

[53] "Section 120. The City Council shall have power to pass, publish or amend or repeal all ordinances, rules and police regulations not contrary to the constitution of this State, for the good government, peace and order of the city and the trade and commerce thereof that may be necessary or proper to carry into effect the powers vested by this act in the city government or any department or officer thereof; * * * "

[54] The reference in question reads as follows:

"Section 2. The fact that it is immediately necessary to commence work on fencing the right of way of the Franklin Canal as a measure of public safety and that this work is awaiting the vesting of title in the United States of America to the right of way aforesaid, creates a great public emergency justifying the suspension of the rule", requiring that ordinances shall not be finally adopted until same are read at two regular meetings of the City Council

parties closed said transaction. The results so gained by the City served its public responsibility under the charter.[55]

Thus it is seen that the defendant City recognized two material and substantial elements of consideration in the transaction under discussion, and, moreover, the facts make it evident that this transaction fulfilled the consideraion requirement of the defendant's charter.

The defendant City also apparently contends that *the ordinance* and attendant quitclaim deed aforesaid undertook to create a species of rights and privileges in the nature of a franchise, without conforming to the procedural requirements of the charter.[56]

[55] The pertinent part of the charter is as follows:

"Section 2. The City of El Paso shall have power to enact and to enforce all ordinances necessary to protect health, life and property, * * * and to preserve and enforce the good government, order and security of the city and its inhabitants; to protect the lives, health and property of the inhabitants of said City."

[56] The material parts of the two pertinent sections of the defendant's charter are as follows:

"Section 35. The right of control, easement, user and the ownership of and title to the streets, highways, public thoroughfares and property of the City of El Paso, its avenues, parks, bridges and all other public places and property are hereby declared to be inalienable, except by ordinance duly passed by a vote of three-fourths of all members of the Board of Aldermen and approved by the Mayor; * * * "

The record does not show that the ordinance in question was published as directed in Section 36 of the defendant's charter. Of course, if the subject matter of said ordinance did not constitute a "franchise", then there was no requirement of publication, and if it is assumed that same was not published, the most natural explanation would be that the parties believed they were not dealing with a franchise.

One of the most satisfactory definitions of a franchise is found in California v. Central P. R. Co., 127 U. S. 1, as follows:

"Generalized and divested of the special form which it assumes under a monarchial government based on feudal traditions, a franchise is a right, privilege or power, of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control

"Section 36. Whenever application is made to the City Council of the City of El Paso for any grant or franchise, lease or right to use the streets, public highways, thoroughfares or public property of the City of El Paso, as provided for in the preceding Section of this Act, before such ordinance or franchise is introduced in the City Council, it shall be published in full in some daily newspaper published in the City of El Paso twice, the first publication being made at least one week before same is introduced in the City Council. When the same has been passed on its first reading, it shall be laid over for at least one week and published in full one time as finally proposed to be passed."

and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security."

The Supreme Court of Texas in T. & P. Ry. Co. v. City of El Paso, 85 S. W. 2d 245, discusses the subject as follows:

"There exists a clear distinction between a franchise and an easement. The grant of a franchise does not carry with it an interest in land. It is a privilege which may be granted and acquired without involving the ownership of land. On the other hand, an easement is essentially an interest in land. It is a dominant estate imposed upon a servient estate. The privilege of using the streets for railway purposes is a franchise. The actual occupation of the streets for railroad purposes by virtue of ordinances is an easement."

Other Texas cases on the point are noted in the margin [57]

It should be kept in mind that the plaintiff Government in dealing with the defendant City to renew the right of way of the Franklin Canal was acting in the interest and right of the plaintiff District, since the Government was somewhat in the position of a temporary caretaker, as under the law the ownership of the works and facilities identified with the Rio Grande Project will ultimately go to the constituent Districts

[57] City of Wichita Falls v. Kemp Hotel Operating Co., 162 S. W. 2d 159;
McCutcheon v. Wozencraft, 230 S. W. 733.

when the Government's outlays of money have been reimbursed, and at the present rate of repayment the plaintiff District should become the clear and absolute owner of all the facilities and properties identified with said project and located in such District, and more particularly the Franklin Canal, about the year 1968.

The plaintiff District was established in 1917 under the authority of a Texas Statute.[28] Later it was converted into a conservation and reclamation district under the Constitution of Texas, but without any change of name. Under the statute it has a broad right of eminent domain "and the authority hereby conferred shall authorize and empower such district to condemn all lands, private and public, for the purposes herein indicated, beyond the boundary of such districts and in any county within the State of Texas", and it also has the power of taxation. In fact, such districts and various other similar districts are not classed with municipal corporations, but are held to be political subdvisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law.[29]

It is not only an arm of the State, but is fashioned to perform public service and duties of high importance in the welfare of the people of Texas. It is in-

[28] Acts of 35th Legislature, General Laws, Chap. 87, p. 172, Regular Session.

[29] Willacy County Water Control & Imp. Dist. No. 1 v. Abendroth, 142 Texas 320, 177 S. W. 2d 936;
Bexar-Medina-Atascosa Counties Water Imp. Dist. No. 1 v. State, 21 S. W. 2d 747.

conceivable to think that the right of way of the Franklin Canal in El Paso, maintained for the public purposes of the plaintiff District, depends for its stability strictly on the will of a technical franchise, as between the District and the City. A franchise distinctively relates to special privileges in the use of public streets, ways and property by private corporations or persons engaged in rendering a service to the general public at a price intended to cover costs and leave a profit. The plaintiff District simply cannot fit that mold. It may be relatively infrequent, but there is nothing singular about one governmental subdivision having a street easement in another political subdivision.[60]

The only thing that could be unique about it is to call the arrangement a "franchise". Even where the two interested parties are a municipality and a private corporation, the mere right of the company to use and occupy parts of the public streets and other ways in the city for a business purpose is not at all necessarily a franchise.[61]

The defendant City under its charter has plenary authority and power over the streets and other public ways within the municipality. That is not to say, that the city owns the fee simple title to such streets and public ways. The Eighth Street previously mentioned

---

[60] Berwynd v. Berglund, 255 Ill. 498, 99 N.E. 705.

[61] Washington Fruit & Produce Co. v. City of Yakima, 3 Wash. 2d 152, 100 Pac. 2d 8, 103 Pac. 2d 1106; Northern States Power Co. v. City of Granite Falls, 186 Minn. 209, 242 N. W. 714; Griffin v. Oklahoma Natural Gas Corp., 37 Fed. 2d, 545; City of Des Moines v. Wellsbach Street Lighting Co., 188 Fed. 906.

was first laid out in the plat of Campbell's Addition to El Paso filed in 188. The familiar general rule is 7 that the abutting property owners own the legal title to the land occupied by a municipal street, subject to the public right and easement to use the property for street purposes and such public right and easement is held for the benefit of the public by the municipality. The record does not disclose any deviation from this general rule in connection with the dedication of said addition. The City still had plenary control, power and disposition of the public user rights and easements in the said street, even without any full proprietary ownership. The law is well settled in Texas that a municipality holding the estate in streets, as aforesaid, for the public cannot surrender or release such public interest therein solely for private uses and benefits,[62] but it is equally well settled that a municipality with such plenary authority over its streets and public ways may relinquish the public rights and easements therein and close a street or other public way in furtherance of a legitimate public purpose and benefit,[63] and such action may be done

---

[62] Jacobs v. City of Denison, 251 S. W. 2d 804; Elston v. City of Panhandle, 46 S. W. 2d 420; Industrial Co. v. Tompkins, 27 S. W. 2d 343, (Writ refused); Malott v. City of Brownsville, 292 S. W. 606; Gambrell v. Chalk Hill Theatre Co., 205 S. W. 2d 126; Texas Co. v. Texarkana Machine Shops, 1 S. W. 2d 928.

[63] Kahn v. City of Houston, 48 S. W. 2d 595 (Comm. App.); Johnson v. Lancaster, 266 S. W. 565; Burrow v. Davis, 226 S. W. 2d 199; Broussard v. L. Cartwright Realty Co., 179 S. W. 2d 277; Malott v. City of Brownsville, 292 S. W. 606; Hartwell Iron Works v. Missouri-Kansas-Texas R. Co., 56 S. W. 2d 922; Eidelbach v. Davis, 99 S. W. 2d 1067.

by a deed relinquishing the public easement in the street even without the formality of either an ordinance or resolution closing such street.[64] Of course the defendant City could not destroy any vested rights of abutting property owners along Eighth Street, if indeed they could now have any enforceable rights after the more than sixty years of acquiescence in the location, maintenance and use of said canal and, besides, that question is not in this suit, as such land owners are not parties, but at least the defendant City was competent to relinquish and quitclaim the canal right of way to the extent of its right, interests and easements as custodian for the public in its capacity as a municipality.

Another source of authority to sustain the City's ordinance and quitclaim deed, here in question, is found in a statute of Texas, now compiled as Article 5244a, Vernon's Texas Civil Statutes, and the material part thereof is quoted in the margin.[65] An appellate Court of Texas has held that this statute supports the

[64] Blair v. Astin, 10 S. W. 2d, 1054 (Writ refused).

[65] "When any County one or more of the boundaries of which is coincident with any part of the International Boundary between the United States and Mexico, * * * and when any City * * * which may be located within any county of such described class, may be the owner of any property, land, or interest in land desired by the United States of America to enable any department or establishment thereof to carry out the provisions of any Act of Congress in the aid of navigation, flood control, or improvement of water courses, * * * any such * * * City * * * is hereby authorized and empowered, upon request by the United States, through its proper officers for conveyance

authority of the defendant City to execute the very quitclaim deed now in question."[66]

It is also noteworthy that the defendant City, in that suit, relied on the validity of the ordinance and quitclaim deed in question as a defense against liability for damages from the drowning death of a boy at a bridge across the Franklin Canal.[67]

---

of title or easement to any part of such property, land, or interest in land, which may be necessary for the construction, operation, and maintenance of such works, to convey the same with or without monetary consideration therefor to the United States of America, * * * ."

[66] City of El Paso v. Mendoza, 191 S. W. 2d 102.

[67] The answer of the defendant City in that tort suit contains a plea as follows:

"Further answering, if need be, and not waiving the foregoing general denial, defendant says that long prior to the acts complained of in plaintiff's petition, defendant conveyed to the United States certain lands, including the bridge described in plaintiff's petition, * * * that said conveyance was executed by authority of an ordinance duly passed by the City Council of the City of El Paso and approved by the Mayor, * * * that title to and possession and control of said lands, and particularly said bridge, are, and have been since the execution and delivery of said deed, in the United States of America; that defendant * * * has no right or power, to maintain or repair said bridge or perform any acts in connection therewith; that the acts complained of in plaintiff's petition, * * * were not the acts of this defendant but of the United States, * * * and this defendant had * * * no responsibility therefor."

The conclusion is reached that defendant City was duly authorized, not only under its charter, but also the additional statute last mentioned, to enact the ordinance and execute the quitclaim deed pertaining to the right of way of the Franklin Canal through El Paso, and this seems so well founded that the discussion might well rest at this point, but will be continued very briefly to touch on one other question mentioned by counsel in their briefs.

The remaining issue of estoppel will not be pursued with any broad analysis of the subject, but it is sufficient to say that under the general rule, as recognized in Texas, also in most other states, the defendant City, under the circumstances herein reviewed, would be held estopped to question the validity of the ordinance and quitclaim deed in question.[2]

[2] Krause v. City of El Paso, 101 Texas 211, 106 S. W. 121 14 L. R. A. (N. S.) 582, 130 A. S. R. 831; Port Arthur v. Young, 37 S. W. 2d 383 (Writ refused). Corpus Christi v. Johnson, 54 S. W. 2d 865; Sutor v. I. & G. N. R. Co., 125 S. W. 943 (Writ refused); B. F. Goodrich Rubber Co. v. Collinsville, 101 S. W. 2d 583; People ex rel Beardsley v. Rock Island, 215 Ill. 488, 74 N. E. 437; St Joseph v. St. Joseph Terminal R. Co., 269 Mo. 47, 186 S. W. 1080; Blennerhassett v. Forest City, 117 Iowa 680, 91 N. W. 1044; State ex rel Cox v. McIlravy, 105 Neb. 651, 181 N. W. 554; El Paso v. Hoagland, 224 Ill. 263, 79 N. E. 658; Boise City v. Wilkinson, 16 Idaho 150, 102 Pac. 148; Sioux City v. C. & N. W. R. Co., 129 Iowa 694, 106 N. W. 183.

Bridges

This subject harks back again to the Franklin Canal One of the predecessors in title, through whom by mesne transfers the Government acquired said canal, was the El Paso Irrigation Company. An ordinance of the defendant City, dated September 16, 1889, granted a franchise with a term of fifty years to said company for the construction, maintenance and operation of the canal through the City. The franchise included the requirement that the Company must "maintain bridges at such points as the Council shall require" over the canal. Then, after succession of title to the Government in 1912, the aforesaid ordinance was amended by another ordinance, dated December 11 1913, which ran to "the United States of America assignee and successor of the El Paso Irrigation Company", and, after making some rather minor changes in the right of way of the canal, continued with a proviso that the Government was bound to "construct, erect and maintain bridges" at certain street crossings over the canal, being 9 concrete bridges, some 70 feet wide and some 32 feet wide, and 2 steel or concrete bridges, one 22 feet wide and the other 20 feet wide, and two steel bridges, both 24 feet wide; "and shall erect and maintain and replace all bridges east of Cotton Avenue with steel or concrete bridges to be 20 feet wide and bridges on such other streets as the Council may require."

The preceding background brings attention next to the quitclaim deed of November 9, 1939, from the defendant City to the Government, and the attendant ordinance, both already mentioned in this opinion. The quitclaim deed redescribes the right of way of the canal, suited to the later perimeter of the City, and enumerates the location of some 31 bridges cross-

ing the canal "heretofore constructed by the Bureau of Reclamation of the United States", and then recites: "this conveyance is subject to the condition that the United States shall be obligated to maintain the said bridges at the said described crossings contingent, however, upon appropriations being made therefor by Congress; and there is further reserved to the said City of El Paso the right to construct and maintain at its own cost and expense such additional bridges and other structures across said canal other than those hereinabove designated as it may deem necessary." Twelve of the thirteen bridges called for in the amending ordinance of December 11, 1913, are among the 31 bridge locations specified in the quitclaim deed last named.

The last quoted recital has provoked one of the disputes herein between the parties. The Government contends for the narrower and the City for the broader meaning of "maintain". The Government clearly is under no obligation to either build or maintain bridges at any except the 31 locations specified in the quitclaim deed.[5] The Government, just as clearly, is bound to maintain the bridges at such named locations. The word "maintain" when directed to the subject of some structure, ordinarily means to keep it in repair and in virtually the same serviceable state. At the same time, the word should not be made a prisoner of any straight-jacket out of the dictionary. In contracts words are not detached abstractions and must take color from the subject matter and the object in mind. The requirement that the

[5] City of Indianapolis v. Indianapolis Water Co., 185 Ind. 277, 113 N. E. 369; Hidalgo County Water Control & Imp. Dist. No. 1 v. Hidalgo County, 124 S. W. 2d 464.

Government should maintain the bridges in question was made to keep, without expense to the City, a necessary link in service at the different canal crossings of the several public streets for the use of vehicular and foot traffic in the City. There is nothing in the writing to suggest any expectation of the parties that the City would ever have to take over the construction or maintenance of a bridge at any of the designated points, so long as the Government or the District continues the use of the canal. In fact, the City had consistently striven in 1889, and in 1931 and in 1939, as above related, to charge the owner of the canal with the duty and expense of maintaining bridges at street crossings over the canal, and in none of the transactions is there any inkling of a contingency which would shift such responsibility to the City, except in the event that use of the canal was abandoned.

The purpose of the use of a public facility, like a bridge, is to serve a continuing and often a growing public demand, a necessity of indefinite duration. If some vandal should blow up one of the bridges in question that would not end the public need for passage over the canal. When the structure and the use are brought into focus, there is little doubt that the duty to maintain such a bridge is imperative enough that it would not be canceled even by destruction of any given bridge.[7] That conclusion leaves only a

[7] State v. Chicago, M. & St. P. Ry. Co., 164 Wis. 304, 159 N. W. 919; Tennessee Electric Power Co. v. White County, 53 Fed. 2d 1065, 1066; People v. Board of Supervisors, 142 N. Y. 271, 36 N. E. 1063; Louisville & N. R. Co. v. United States Iron Co., 118 Tenn. 104, 101 S. W. 414, 419.

short stride to say further that the duty to maintain the bridges in question also demands that said bridges be kept adequate for the needs of common traffic, even if it is necessary to widen, lengthen or reenforce any such bridge to keep pace with a growing traffic load.[7] It is significant that the amending ordinance of December 11, 1913, aforesaid, specifies varying widths for the 13 respective bridges mentioned therein, obviously actuated by an awareness of the differing traffic densities and needs as between the various bridges, and this circumstance points up the fact that the parties were not thinking in terms of any dead monotony of bridge maintenance, but had an eye to meet the varying public need. This is enough to indicate that more than a mere routine of repairs and upkeep lies within the perspective of "maintain" when it is appraised in the sense of said quitclaim deed. The Government's covenant to maintain bridges does not have the aspect of a static liability, confined simply to keeping the existing bridges unchanged, but looked at in the context of the attendant transactions, the undertaking to maintain must be read in reasonable furtherance of the function of such bridges. From that standpoint it is only reasonable to say that the Government has bound itself to do any and all reason-

[7] State v. Lehigh Valley R. Co., 89 N. J. Law, 42, 97 Atl. 786; affirmed 100 Atl. 167; Commonwealth v. Inhabitants of Deerfield, 6 Allen (Mass.) 546; Davis Holding Corp. v. Wilcox, 112 Conn. 542, 153 Atl. 169; Plimpton v. New York, N. & H. R. Co., 221 Mass. 548, 109 N. E. 732, 733; McCutchen v. City of Siloam Springs, 185 Ark. 846, 49 S. W. 2d 1037; Rhodes v. Mummery, 48 Inc. 216, 218; State v. Olympia Light & Power Co., 91 Wash. 519, 158 P. 85, 89.

able rebuilding, restoration, enlargement, reenforcement, and repairs, which may be required to keep at the specified crossings bridges suitable and adequate to serve the public traffic needs at each of said locations, as same may vary with settled shifts in traffic density during the years, and such is the holding of the Court.

The aforesaid liability of the Government is contingent upon appropriation of the necessary money by Congress, but plaintiff District, concurrently with the quitclaim deed of November 9, 1939, and auxiliary to that transaction, duly assumed the secondary liability in favor of the defendant City to pay for the maintenance of bridges at the foregoing several locations, whenever the necessary funds are not appropriated by Congress or provided by the Government or its agencies.

Water Supply Contracts

Under date of February 18, 1941, a contract was executed between the United States of America, the City of El Paso, and the El Paso County Water Improvement District No. 1, and subsequently, under date of December 1, 1944, a contract was executed between the same parties, and additionally, the Elephant Butte Irrigation District. The objective of each contract was to furnish a supplemental supply of water for municipal purposes to the defendant City, but wthin the ambit of the Reclamation Act. Both contracts remain in force, with the qualification, as stated in the second contract, that "It is understood that this contract is amendatory to the El Paso District contract, which shall not be affected by the provisions hereof, except as the same may by the pro-

visions hereof, be expressly modified." The present inquiry does not touch any of the divergences therein, but goes to terms covered in substantially parallel provisions of the respective contracts. The inducement recital, from the standpoint of the City, identical in each contract, is quoted in the margin.[72] The special feature in contractual mechanics was a provision for the City to acquire water right lands within the Rio Grande Project, but not to exceed 2,000 acres in either of the two Districts, in keeping with its "desires to receive each year from the Project water supply an amount of water not to exceed the amount of water which such acquired lands would be entitled to receive from said water supply for the respective year, if held in private ownership of qualified Project landowners, which will in no event be in excess of three and one-half ($3\frac{1}{2}$) acre-feet of water a year for each acre of such acquired land." Other provisions deal with the facilities the City will provide for receiving delivery of water, the charges and terms of payment to be made by the City, and many other particulars about the performance of such contracts. In particular a further and somewhat novel provision

[72] "Whereas, the City which now owns and operates a municipal water system, including deep wells, reservoirs and distribution works, needs and desires to procure from the Project water supply a supplemental water supply to meet the present and anticipated future needs of the City and its inhabitants; and there is available to the City no practicable source of such supplemental water supply other than the said Project water supply;"

singled out for attack by the City is quoted below from the second contract.[74]

---

[74] "(a) Before delivery of water to the City as provided in Article 8 hereof * * * the City's Superintendent shall deliver to the Managers of the respective Districts

"(1) Evidence of the City's ownership of acquired lands within said affected District.

"(2) Powers of attorney duly executed on behalf of the City authorizing each, the Elephant Butte District and the El Paso District, as attorneys in fact for the City to offer for sale and sell and convey to the highest bidder, who shall be a qualified landowner, for cash at public auction after notice of such sale, published once a week for three (3) consecutive weeks, each in a newspaper of general circulation in said Districts, any of said lands held by the City in either of said respectve Districts after the expiration of ninety (90) days from the effective date of the termination of the City's right to receive water under the provisions of this agreement as provided for in Article 11 hereof. Such powers of attorney shall continue in force from the date of their delivery until the expiration of one year from and after the effective date of such termination of the City's right to receive water: Provided That notwithstanding such powers of attorney, the City may at any time prior to the date of termination of the City's right to receive water hereunder, convey unconditionally any of the acquired lands within either of said districts to qualified landowners without the execution of additional instruments by either of said Districts for the release of said District's respective power of attorney."

(The first contract in question contains a similar provision, but worded to fit the circumstance that only one of the two Districts was a party to that contract.)

. . . . . .

"(c) The proceeds from the sale of any land made under the powers of attorney provided for in this article shall be applied first to pay the reasonable costs of conducting such sale and next to the payment to the said District in which such lands are located of any amount at the time of such sale remaining due and unpaid to such District pursuant to this contract, and any amount of such proceeds thereafter remaining shall be paid to the City."

"(d) Upon the termination of the City's right to receive water under the provisions of this agreement, the City shall offer for sale and endeavor to sell and convey any acquired lands then held by the City to qualified landowners."

. . . . . .

On its part the City made ready to put said contracts in motion by acquiring numerous scattered tracts of water right lands, aggregating about 1,400 acres within the Project territory, and built a water treatment plant as its chief facility for use in receiving delivery of the water. The parties herein carred on agreeably under these contracts for about ten years, with a regular routine of water deliveries by plaintiffs and payments therefor by the defendant, but in 1951 new City officials, recently elected, began challenging such contracts, as well as other past transactions between the parties, until the points of controversy matured into this law suit.

The defendant City argues that the above contracts are invalid, as the Secretary of the Interior had no authority to so bind the United States, and that same were ultra vires of the City, and that same were without consideration. Counsel for the Government couner all said points of attack against the contracts. In the first place, the pivot of the question about the auhority of the Secretary of the Interior is that the contracts in question infringe the 160 acres restriction in the Reclamation Act.[74]

It may be pointed out that said statute refers to land "in private ownership", while any land bought by the City under these contracts would be held in public ownership, and, moreover, the statutory language refers to watered land and the land of the City would not fit that description. Other statutes in pari materia have been cited by counsel,[75] but the self-sufficient source of explicit authority for the Secre-

[74] Act of June 17, 1902, 32 Stat. 388 (43 U. S. C. Section 431).

"No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanentally attach until all payments therefor are made."

[75] Act of Feb. 21, 1911, Section 2 (36 Stat. 926).
Act of Aug. 9, 1912, Section 3 (37 Stat. 266).
Act of May 25, 1926, Section 46 (44 Stat. 649, 650).

tary of the Interior in the execution of the aforesaid contracts is found in still another statute.[76]

The Defendant turns said last proviso in the statute next quoted below against the validity of the contracts by saying that such contracts obviously were "detrimental to the water service for such irrigation project", but the short answer is that not only the Secretary of the Interior, but also the two Districts constituting the Project geographically have joined in said contracts, that is, one District in the first contract, and the two Districts in the second contract, which rather forcibly negatives any such detriment, but, aside from that, taking the City's acquired lands out of irrigation did not at all lessen the water deliveries to other irrigated lands and neither would the City's lands going without crops perceptibly injure

[76] Act of Feb. 25, 1920 (41 Stat. 451) (43 U. S. C. Section 521).

> "The Secretary of the Interior in connection with all operations under the Reclamation Act is authorized to enter into contract to supply water from any Project irrigation system for other purposes than irrigation, upon such conditions of delivery, use and payment as he may deem proper: Provided, that the approval of such contract by the water users' association or associations shall have first been obtained; * * * Provided further that no water shall be furnished for the uses aforesaid if the delivery of such water shall be detrimental to the water service for such irrigation project, nor to the rights of any prior appropriator; * * * "

or damage any of the farming landowners. Instead, conceivably, it may have been a benefit.

In dealing with the authority of the Secretary of the Interior in making these contracts the point has been discussed as being a proper question of law raised in the case, but, in reality, it is doubtful that such authority is open to question by the defendant City, since same are acknowledged to be subsisting by the plaintiffs, and, in any event, the aspect of continuing executed performance by the plaintiffs is the main impact of said contracts in this suit.

"The authority for such contracts, from the standpoint of the City, is clear enough."[7] The defendant City contends, however, that these particular contracts are vitiated by public policy and, particularly, the rule that municipal corporations in their legislative, governmental and police power functions cannot barter away their discretion and continuing responsibility for the public welfare or fetter themselves in the control and use of public property, and, of course, if these contracts violate that well settled principle same are invalid. The power of attorney provisions and the requirement that a resale of the City's water right lands must be confined to a qualified landowner under the Reclamation Act, quoted in a preceding footnote, are the particular target for the defend-

[7] The defendant's charter in Section 1 makes it capable "of contracting and being contracted with"; and provides that it "may take, acquire, hold and purchase, lease, grant, sell or convey such property, real, personal or mixed, as the needs or purposes of the corporation may require, either within or without the limits of the

ant's attack. In the first place, an important thing to keep in mind is that in the execution of the contracts in question the City was acting, not in its public or governmental capacty, but in its municipal and propriatary capacity.[78] True enough the power of attor-

City. * * * ". Then, Section 2 says, "it being intended by this Act to grant to and bestow upon the inhabitants of the City of El Paso full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this Charter or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas." Still more explicit, Section 92 confers authority "To provide, or cause to be provided, the City with water; * * * "

[78] Wichita Falls v. Lipscomb, 50 S. W. 2d 867, (Writ refused). San Antonio Independent School Dist. v. Water Works Board of Trustees, 120 S. W. 2d 861, (Writ Refused). Ysleta v. Babbitt, 28 S. W. 702. Lenzen v. New Braunfels, 35 S. W. 341. Community Natural Gas Co. v. Northern Texas Utilities Co., 13 S. W. 2d 184. City of Crosbyton v. Texas-New Mexico Utilities Co., 157 S. W. 2d 418

"In the exercise of its proprietary or business functions, however, such as those which it exercises when it enters into a contract for the private interests of its own inhabitants or of itself, a municipal corporation * * * is at liberty to exercise these powers in the same way and to the same extent as individuals or private corporations and it is settled by a long line of decisions of the Courts of this state that the ownership and

ney section of the contracts did tie the hands of the City to a degree in respect to any later disposition of the water right lands acquired by the City and in many transactions that kind of a restraint upon a municipality might be obnoxious to public policy, but that does not necessarily follow in all transactions. Such a restriction certainly can be legitimate where it is reasonable and works to a proper end within the framework of the particular transaction. In this instance, the contractual provision in question was not capricious, arbitrary or unreasonable. The plaintiffs did not solicit the defendant, but instead the defendant came to the plaintiffs seeking a supplemental supply of water, and this would be a special kind of transaction outside the ordinary routine of the Project. The City was not, although it might have been, within the bounds of the Project. The Secretary of the Interior, in the exercise of his discretion and judgment, was authorized to make such a contract with an outsider. He consented to do so and the way it was worked out, as most expedient to serve the purpose, there would be a deviation from the usual course of water service, since the water right lands which the City was to acquire, would be retired from irrigation and the water normally apportionable to such lands for irrigation would instead be delivered for municipal purposes of the City. All that the assailed terms of the contracts did was to safeguard the condition that on termination of the contracts the lands of the two Districts must remain intact as an irriga-

operation of public utilities, such as water works, electric light plants and street railways, is not a governmental function, but is proprietary in its nature and constitutes a business or corporate function of the city."

tion project, and to that end the City would be bound to sell either directly, or under the power of attorney, all of its water right lands to one or more qualified landowners. Presumably, without such terms the plaintiffs would not have executed the contracts. The Supreme Court of Texas has authoritatively settled the controlling principle against the contention of defendant City,[79] and there are somewhat kindred cases from other Courts.[80]

After all, the elements of the present question are not greatly different in principle from what the circumstances would be in event the defendant City should buy land [illegible]ny where subject to an outstanding debt, or issue water works revenue bonds, secured by a deed of trust, which authorized the trustee therein to make a sale in event of any default in payment of the lien debt.

Even if a part of the contracts under discussion is invalid, that would not necessarily nullify the whole contract.[81]

[79] Guadalupe-Blanco River Authority v. City of San Antonio, 145 Tex. 611, 200 S. W. 2d 989.

[80] Interstate Materials Corp. v. City of Houston, 236 S. W. 2d 653. Henry H. Stambaugh Auditorium Assn. v. City of Youngstown, 55 N. E. 2d 672 (Ohio). Allen v. Detroit, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (H.S.) 890. Clarke v. Brookfield, 81 Mo. 503, 51 Am. N. 243. Tillman v. Mayor, etc. of City of Athens, 206 Ga 289, 56 S. E. 2d 624. San Francisco v. Boyle, 195 Cal. 426, 233 P. 965. Omaha Water Co. v. City of Omaha, 147 Fed. 1.

[81] Saylor v. City of Abilene, 290 S. W. 239, affirmed 295 S. W. 578. Kelly v. Merry, 262 N. Y. 151, 186 N. E. 425. City of Del Rio v. Glen Contracting Corp. 94 Fed. 2d 701. Gardner v. City of Dallas, 81 Fed. 2d 425.

The two contracts discussed above, not only reflect sufficient consideration, but are valid and binding in all parts, and the plaintiffs are entitled to recover from the defendant all unpaid sums accrued and due under such contracts.

Contract of August 10, 1949.

Under the above date plaintiff District and defendant City executed a writing in the tenor of a compromise contract. It grew out of the already mentioned application made by the City to the Board of Water Engineers of Texas for a water appropriation permit. The application sought to appropriate some of "the unappropriated storm and flood waters of the State of Texas, and the unused return flow water of the Rio Grande Project * * * for municipal and domestic use, from the Rio Grande in El Paso County, Texas." The protests aroused by said application have already been related herein. The application came on for initial hearing December 13, 1948, which continued for two days but was not closed. By agreement of all parties the Board took the application under advisement, and the matter thereafter was further postponed from time to time afer an amicable disposal became a subject of discussion between the parties. This environment was the origin of the above writing dated August 10, 1949. The introductory recitals therein most material presently are quoted below.[82]

[82] "Whereas, there has been appropriated under the laws of New Mexico and Texas for and on behalf of the Rio Grande Federal Reclamation Project in New Mexico and Texas, * * * and appropriations have also been made for Hudspeth County Conservation and Reclamation District No.

Both the City's application for a water permit and the second contractual recital, quoted in the last footnote, speak of storm and return flow waters, and at first that might be taken to indicate the crux of the supposed compromise, but a more attentive look brings home the reality that the storm and return flow waters described in the contract are at the same

---

One, * * * , and the District claims all such appropriations cover all of the appropriable waters of the Rio Grande River for the irrigation of lands in said Districts; and,

"Whereas, in normal operation of the Rio Grande Project there are intermittent flows of water in the Rio Grande River in the vicinity of the City in excess of the requirements of the District and the Hudspeth District, resulting from Project developed drainage and return flow during periods of non-irrigation use, storm run off, and unavoidable Project operating wastes due to sudden climatic changes occurring intermittently throughout the year, and other exigencies involved in the release and distribution of water for use upon said Project lands; and

* * * * * * * *

"Whereas, it is the desire of the District and the City to cooperate to the end of avoiding controversy and litigation between themselves and to settle and compromise their respective claims involving relative rights and priorites of use of the waters hereinabove referred to for domestic and irrigation purposes."

time waters which otherwise would be wastage from the District. In other words, the plaintiffs already will have had prior use, so far as usable, of the water described in the contract, whether storm, drainage, return flow or waste water, before same comes to the hands of the defendant. There is no denial that water once rightfully in the custody of the plaintiffs for Project purposes, after initial use, can be recovered by return flow and used again, that is, a repeated use in the same project,[83] but the return flow water of this contract is distinctly surplus and will have no place to go for further irrigation in the Project, or even in the Hudspeth District.

Next, several pertinent contractual terms of the agreement will be set out in the margin.[84] The con-

[83] Ide v. United States, 263 U. S. 497 "The evidence shows that the ditch is intended to collect Project waters once used in irrigation, and found seeping or percolating where they are not needed, and to conduct them where they can be used in further irrigation. This plainly is an admissible purpose."

[84] "1. The District, * * * will permit use by the City of Rio Grande Project works serving the District lands, for the purpose of this agreement, to the extent, in the manner, and at such points, as will not interfere with the operation and use of such works for the benefit of the District and its lands. * * * ."

* * * * * * * *

"3. The determination of availability of such waters as to time, points of availability, and quantity, and the requirements of said two Districts from time to time, shall be made by said Proj-

tract is hard to rationalize. The plaintiffs had a New Mexico appropriation and a Texas appropriation, and

ect Manager, whose decision shall be final; and the diversion and use of such waters by the City shall be confined to and in conformity with such determination."

* * * * * * * *

"7. For use of the Project works, * * * the City will pay to the District, * * * charges at rates and in amounts as follows:

"(1) For each and every acre-foot of water diverted and used by the City for the diversion and use of which Project works are used, the City will pay at the same rate of charge per acre-foot then prevalent for excess water as made by the District against its lands. 'Excess water', as used in this paragraph, means those waters delivered to district lands, in addition to that which may be delivered to said lands by the District upon the payment of the District's minimum charge."

* * * * * * * *

"12. The City shall be free to prosecute to a conclusion, or dismiss, as the governing body of the City shall, in its judgment and discretion determine, the City's application now pending before the State Board of Water Engineers, * * * whereunder the City seeks to appropriate waters of the Rio Grande * * *. If the City shall elect to prosecute said application to a conclusion, any award or permit granted thereunder by the State Board of Water Engineers shall, by stipulation of the parties hereto filed in said proceeding, be made subject to the terms and conditions of this undertaking."

the defendant had pending an application for a water appropriation permit in Texas. The plaintiffs' Texas appropriation was far insufficient to cover the irrigation needs of the Texas lands in the Project, but was senior to the defendant's subsequent permit. Consequently, the said two perfected and one prospective appropriations did not plausibly harbor any potential conflict except for the plaintiffs' contention that their New Mexico appropriation in effect has extra-territorial force and supplants the law of Texas in the control of water brought down the river from New Mexico for use in the Texas part of the Project. This proposition, seemingly, presupposes that Texas has no legal interest in the stream flowing down the Rio Grande while in New Mexico, but such a premise is repudiated by the Supreme Court.[85] The plaintiffs'

[85] Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92.

"The La Plata River rises in the mountains of Colorado, flows in a southerly direction until it reaches the boundary of New Mexico and in the latter State until it empties into the San Juan River. The stream is non-navigable; has a narrow watershed; and a large run off in the early spring. Then the quantity flowing begins to fall rapidly; and during the summer months little water is available for irrigation. In each State the water of the stream has long been used for irrigation; and each adopted the so-called appropriation doctrine of water use. Under that doctrine the first person who acts toward the diversion of water from a natural stream and the application of such water to a beneficial use has the first right provided he diligently continues his

other view that water rights under the New Mexico appropriation became appurtenant to the Project lands in Texas is a corollary of what has just been said and imputes to the law of New Mexico, aided by the Reclamation Act, the novel potency to settle an appurtenant in the nature of an incorporeal hereditiment upon land in Texas. Either the law of Texas

---

enterprise to completion and beneficially applies the water. The rights of subsequent appropriations are subject to the rights already held in the stream.

"The relative rights of all claimants to divert in Colorado water from the La Plata River were adjudicated in a proceeding under the Colorado Statutes. * * * The Ditch Company claimed that by reason of the 1898 decree it was entited to all the water in the stream except that required to satisfy the Colorado priorities. If it had been permitted to draw all that water none would have been available to the New Mexico water claimants, who, under similar laws, had made appropriations. Some of them were earlier in date than the Ditch Company's.

* * * * * * * *

"It may be assumed that the right adjudicated by the decree of January 12, 1898, to the Ditch Company is a property right, indefeasible so far as concerns the State of Colorado, its citizens, and any other person claiming water rights there. But the Colorado decree could not confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream; and its share was only an equitable portion thereof."

has a dominant place or is relegated to the background in this particular scheme of things, and the problem is not resolved by recognizing the state law in principle and denying it in practice. Of course, the impotency of the New Mexico appropriation in Texas is compensated by the Interstate Compact, but that has nothng to do with a proper analysis of the present contract.

The contest over the defendant's application for a permit did not come to a showdown. Under the contract in question the protestants withdrew their opposition, and defendant was expressly left free to prosecute its application to a conclusion, but with the reservation that any permit would be "subject to the terms and conditions of this undertaking". Manifestly, the parties contemplated that the prospective permit thereafter issued to the defendant could be of some force and validity. They did not profess to do more than make it subject to such contract. That stipulation itself is rather indefinite, but at most probably meant that defendant would not exercise any such permit in derogation of plaintiffs' claimed priority in the Rio Grande water used to irrigate Project lands. Even if it was a binding contract, the defendant by its permit at least acquired a right secondary to that of the plaintiffs. It follows, so far as this record shows, that the defendant has as good right as any one else to claim and receive the water in question, without paying for it as such, when the plaintiffs are through with it for irrigation, whoever has the actual and legal first right to such water. Neither of the plaintiffs ever had any outright ownership of the water, but only an usufructuary interest. That interest in some residue would necessarily end sooner or

later. Under the circumstances mirrored in this contract, there was nothing the plaintiffs had to sell, except a rental use of the Project works. In fact, the District must have the same viewpoint since the contract does not purport to make a sale of water as such, but simply evidences a kind of license to use Project works for a stipulated compensation.

Turning back now to pick up again, the perplexity thickens in trying to put a finger on what was compromised. It sounds simple enough to say each of the parties gained a quid pro quo by reciprocal concessions, in that the plaintiffs waived further opposition to defendant's applcaton for a permit, while the defendant subordinated its prospective permit to the priority of plaintiffs in rights to water of the Rio Grande, but that statement is questionable upon close inspection. The plaintiffs' Texas appropriation undoubtedly by law had priority against the defendant's permit, but, on the other hand, the plaintiffs' New Mexico appropriation intrinsically had no legal priority or other standng against the defendant's permit in Texas. Moreover, the plaintiffs' concession was practically nominal because the defendant's concession left the plaintiffs as well off to all intents and purposes as if they had continued their opposition and blocked the issuance of a permit to the defendant. These views suggest strongly that the contract lacks the consideration ingredient and is illusory in its aspect as a compromise pact, but a definite ruling is unnecessary since that question does not control the decision of the Court, and, besides, said contract is revocable by either party upon reasonable notice at any time.

In any event, the contract is valid in its aspect as a rental of Project works for use in delivery of water to the defendant. There is a noticeable analogy between the charge against the defendant in this instance and the charge authorized against a riparian owner under the terms of Article 7545 Revised Statutes of Texas 1925. The defendant City has no right to recover payments made in the past under said contract, and will be bound to continue such payments in the future so long as the Project works are used as a means to deliver the water, but no such charge is justified for water of the kind described which is released into the river bed and taken by the defendant without use of any Project facilities in the immediate method of taking and receiving said water.

Sewage Effluent

Defendant City gets more than half of its municipal water supply from pumping wells, and the remainder comes from surface water, such as diversions from the Franklin Canal and the Rio Grande. At present its water output averages about 24 million gallons per day and it climbed to over 39 million gallons the peak day of 1954. In recent planning the City has taken steps to make sure of underground water reserves ample for many years and a consulting ground water hydrologist has reported that taking one nearby locality "At least 25 to 40 million gallons of fresh water per day, therefore, can be pumped from the ground water reservoir for a period of 100 years." This leaves no doubt that the City prudently anticipates it must rely on ground water for the greater part of its supply indefinitely. Such ground water, of course, constitutes new water in relation to the Rio Grande and the Project. The City

has a sewage disposal plant on the river. In the contract of August 10, 1949, there is a paragraph relative to the sewage effluent of the City and providing in part, "It is further understood that after such effluent is discharged into the Rio Grande it constitutes part of the Project water supply." Such effluent is mixed with other Project water in the river and used in irrigation of Project lands, so, presumably, after the effluent has been treated in one or both of the sewage plants and diluted with other water the mixture is suitable for irrigation use and such practice does not conflict with public health and sanitation standards. The City stresses its point that over the last ten years and every such year, except one or two, its sewage outfall to the Rio Grande has exceeded its diversions from the Rio Grande and contends for some kind of proper credit on that account in its dealings and settlements with the plaintiffs. This issue becomes simpler when it is kept in mind that the act of the plantiffs, in superimposing the Project upon the face of nature, has confused the means of identifying riparian waters and storm waters as the distinctions are made under the laws of this State. The two types of water are impounded indiscriminately and commingled behind the Elephant Butte Dam. Inevitably, when any release from such storage reaches Texas, it will be a blend of both types of water and this record fails to disclose any known means of ascertaining accurately the respective proportions of said two types in any given mass of water. Necessity impels a fresh approach in trying to work out the respective rights of the parties. The normal processes for dealing with water right conflicts are simply unworkable under the circumstances of this case. The apparent reason for the excess of sewe-

outfall over river diversions comes in part from the factor of new water produced in the City's pumping supply. In any event, the proof shows that the City puts in more outfall than it takes out water from the river and, consequently, the river diversion works no proven loss or damage to the plaintiffs or, for that matter, any one else concerned, and that ought to hold true so long as the diluted effluent has irrigation utility as a lawful practice. The fair and equitable rule is that the City for the foreseeable future should be entitled to make direct diversions for municipal use from the river, without having to pay for such water so long as such diversions are less in volume than the outfall to the river. The City has no traditional riparian right to exercise, but it is located on the river, with many miles of river frontage, and may have some title to the bordering river bed, so there is no strain of equity in saying that the City must have some right, akin in a way to the riparian doctrine, to make free use of the river water to the extent above limited. In any event, the plaintiffs here in would have no strong ground for complaint, if they are unable to demonstrate any tangible or substantial injury. Some cases, with supporting analogy, are cited in the footnote.[86]

---

[86] Texas Co. v. Burkett, 177 Texas 16, 296 S. W. 273, 54 A.L.R. 1397, Brown v. Cunningham, 82 Iowa 512, 48 N. W. 1042, 12 L.R.A. 583, State v. American Fruit Growers, Inc. 237 Pac. 498, Smith v. Duff, 39 Mont. 382, 102 P. 984, 133 Am. S. R. 587, Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P. 2d 1074, 89 A.L.R. 200, Garny v. Huntington, 97 Pac. 428, Wiggins v. Muscupiable Land & Water Co. 113 Cal. 182, 45 P. 160, 32 L.R.A. 667, 54 Am. S. R. 337.

Canutillo Wells

The defendant City owns a tract of land at the side of the river some sixteen miles upstream and has drilled several water wells thereon, which have been and are contributing to the municipal water supply. The Government has constructed certain works in that same vicinity, including drains and laterals. All or part of the water pumped frim said wells is put in and passes along said drains and laterals into the river, then goes down the river, forming a part of whatever body of water may be in the river at the time, next is diverted at the American Dam to the American Canal and the Franklin Canal until same, that is the water equivalent, is rediverted from the Franklin Canal to the defendant's water treatment plan. The Government takes the stand that it is entitled to compensation and has been demanding payment for the use of said public works in the travel of such water from the well site to the plant. The defendant contends that it has a free right to use the river bed as a conduit or channel to carry said well water. The defendant does have the right,[87] but the defendant must pay for making use of said facilities in delivering said water, except that it is not bound to pay for any involuntary use of the American Dam and the two canals if it wants such water to stay in the river bed on down to its intake equipment at the water treatment plant, and it is mechanically feasible

[87] Parker v. El Paso County Water Imp. Dist. No. 1, 116 Texas 631, 297 S. W. 737. Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P. 2d 1074, 89 A.L.R. 200. Butte Canal & Ditch Co v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769. Miller v. Wheeler, 54 Wash. 429, 103 P. 641, 23 L.R.A. (N.S.) 1065.

to make such segregation at the American Dam. The City is liable to pay reasonable compensation for what use it has been making and continues to make of such Government works.

A judgment will be entered in conformity with the findings, rulings and directions herein.

(S.) JOSEPH B. DOOLEY,
United States District Judge.

JUDGMENT AND DECREE.

(Filed August 2, 1955.)

Be It Remembered that on a former day, to-wit: November 15, 1954, came on to be heard the above cause before the Court without a jury, and the plaintiffs El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers, together with the United States of America, appeared by their attorneys, and the defendant City of El Paso also appeared by its attorneys, and all parties having announced ready for trial, the Court proceeded to hear the pleadings, evidence and argument of counsel, and the trial continued from day to day until November 20, 1954, when the Court took the case under advisement until same was reopened for an additional hearing on June 9, 1955, and on said date all parties again appeared before the Court and the hearing continued until June 10, 1955, when the Court again took the case under advisement until this, the date shown at the end hereof, upon which date the Court rendered

this judgment, and it is Now Ordered, Adjudged and Decreed as follows:

I.

Rio Grande Waters

That the waters of the Rio Grande to which the United States of America is entitled for the benefit of the Rio Grande Reclamation Project, pursuant to the Reclamation Act of June 17, 1902, by virtue of the appropriation notices filed under the New Mexico Territorial Laws in January 1906 and April 1908, respectively, as well as any and all other waters impounded at the Elephant Butte and Caballo reservoirs in New Mexico, are definitely, committed in prior right by the Rio Grande Compact of 1938 between Colorado, New Mexico and Texas, approved by the Congress May 31, 1939, to the service and use of the lands in the said Project lying in the states of New Mexico and Texas, except the treaty quantity of 60,000 acre feet per annum allocated to Mexico, but this does not mean that said New Mexico filings govern as the source of rights to waters of the Rio Grande present in the river channel on the boundary of the State of Texas, including waters which have come down the river from New Mexico.

That the defendant City of El Paso is entitled to have and use for any purposes waters from the Rio Grande covered in the Permit issued to it by the Texas Board of Water Engineers, dated May 10, 1950, that is storm and flood waters, waters from local rains, return flow and waste waters, including return flow and waste waters from Project lands after the latter waters are no longer wanted for the uses

of the Project, but the water entitlement of the defendant under said Permit is fully subject to the priority and superiority of the appropriative rights and entitlement held by the plaintiff United States of America and its assigns for the benefit and use of the Project and the owners of water right lands therein by force of the Compact and under "Certified Filing" No. 123 made by the said plaintiff through its representative, with the Texas Board of Water Engineers in the year 1914, to protect the appropriation of the Rio Grande waters made by Loomis and others in the year 1889 under the then water laws of Texas; but the City of El Paso, notwithstanding its river frontage and ownership of some riparian lands within the City, has no traditional riparian right to claim an independent and additional supply of water from the river for the general public and municipal requirements in the City; and it is further Adjudged that the channel of the Rio Grande along the boundary or inside of El Paso County is no part of the facilities belonging exclusively to the Project, but is subject to the ordinary use of a natural river bed under the laws of Texas, including use for the free carriage of water alike by the Project, District or City.

II.

Canutillo Well Water

That the City of El Paso may not pump water from its Canutillo wells into the bed of the Rio Grande above El Paso and thereafter take water, either directly from the river or by means of diversion from the Franklin Canal, at its water treatment plant or elsewhere, without reasonable and adequate adjust-

ment for loss in transit caused by seepage, evaporation or transpiration, but, subject to such adjustment deductions, may do so without being liable to pay any toll or charge to the plaintiffs, unless the defendant to that end voluntarily makes use of Project facilities, in which event it must pay compensation therefor in a reasonable sum, until such time as the parties may fix the amount of such charge by written contract.

III.

Franklin Canal

That the City of El Paso Ordinance, dated November 9, 1939, recirded in Book Z-2, pages 448-49, of the Minutes of the City Council, making the obligation of the United States of America to maintain bridges at the various street crossings over the Franklin Canal hereafter mentioned contingent upon appropriations therefor being made by Congress, and transferring to the United States of America all the City's right, title and interest in the Franklin Canal, is valid and binding on the City; and the quitclaim deed, dated November 9, 1939, from the City of El Paso, as grantor, to the United States of America, as grantee, recorded in Book 660, page 399, of the Deed Records of El Paso County, Texas, is valid and conveyed to the United States of America whatever interest, if any, the City had in the said Franklin Canal or other property described in the deed, and conveyed an easement for said canal right-of-way.

IV.

Contracts

That the contract dated February 18, 1941, between the United States of America and the City of El Paso

and the El Paso County Water Improvement District No. 1, is in all respects valid and binding on all of the parties to it; and the contract dated December 1, 1944, between the United States of America and the City of El Paso, the El Paso County Water Improvement District No. 1 and the Elephant Butte Irrigation District is in all respects valid and binding on each of the three first named parties thereto, but the last named party thereto is not a party in this suit; and the contract of August 10, 1949, between the El Paso County Water Improvement District No. 1 and the City of El Paso is valid and binding on the parties thereto in its aspect as a rental of Project works for use in delivery of water to the defendant.

V.

Use of Project Facilities

That the City of El Paso may not utilize the distribution facilities of the Rio Grande Project for carrying any part of its water without prior authority from the United States of America, and, specifically, shall not discharge water into the Vinton river lateral, Canutillo lateral wasteway or the Vinton river drain, or divert water from the Franklin Canal without first being duly authorized by the United States of America.

VI.

Effluent Offset

That the defendant City of El Paso, whenever there is Project water standing or flowing in the Rio Grande bed by the defendant's present water treatment plant, and while the defendant continues to discharge the municipal sewage effluent into the river bed at or

near the present point of outfall upstream from the Riverside Heading and same is used to irrigate Project lands, or as a component of residue water delivered from the Project works under contract for irrigation on outside lands, shall have the right and be entitled to take at said plant in its own way and pay free, but only from the adjacent river bed and without the use of Project facilities, a quantity of Project water within a maximum equal to the quantity of sewage effluent being discharged currently into the river bed, one day at a time, or double that amount in the contingency hereinafter stated, but this offset right is to stand on a calendar monthly basis, beginning August 1, 1955, whether or not the defendant effects all or any of such offset entitlement in some month or months, respectively, and each month shall be a new and separate period without any carry over or accumulation of offset entitlement from any given month to the next or any later month, and such offset must be made by the defendant daily between the intake and outfall of each day whenever there is Project water in the river bed at the locality aforesaid sufficient for full or partial offset, or defendant will lose all further claim for any day up to the amount of available but untaken water, provided that so long as defendant is short of a full equalization offset in any current month, after an adjustment for any available water on a given day or days during the month, which the defendant failed to take within the daily limits, the daily offset by defendant from day to day during the remainder of that month may be twice the amount which otherwise would be the regular limit for such day, so far as the water supply in the river at the time will suffice; but so often as defendant falls short of full offset, or effects no off-

set, whatever the reason, even if beyond defendant's control, in any calendar month, said offset deficit shall always become canceled and held for naught to all intents and purposes at the end of such month by force hereof, except as next stated; and provided further that if hereafter, at any time, the facilities or operations of the Project are so changed or reorganized that the proportion of all the Project water destined for the irrigation of Project lands presently served through the Riverside Heading, which is being moved by flowage in the river bed alongside the defendant's said plant, becomes in any month or months, respectively, as much as ten per cent (10%) less than the average proportion thereof so moved for the particular month in the five (5) years of 1950 to 1954, then so long as defendant's sewage outfall at the same time is being used in irrigation of Project lands, or for delivery from the Project works to irrigate outside lands, and if the defendant has an offset deficit for such month, the plaintiffs shall be bound to deliver offset water by other means and at their expense to defendant at its said plant promptly, equal to the additional quantity defendant could have taken from the river under the terms and restrictions hereof, but for the smaller quantity of water in the river, and in calculating the additional offset due the defendant in such event the deficiency in the quantity of river water during the month in question, determined by comparison with the five year average aforesaid, shall be spread equally over the number of days in a given month.

The defendant is not bound for any definite time to continue the discharge of sewage effluent into the river bed, but in event it hereafter makes other dis-

position of substantially all said effluent by sale or otherwise, the preceding paragraph hereof shall thereupon be annuled; but so long as same remains in force, the defendant at its expense shall accurately measure by meters or other standard devices, installed at the points of outfall and intake, and keep records of its daily outfall of effluent and intake of offset water and deliver to the Project Manager a verified report thereof in writing for such month on or before the tenth day of the succeeding month, beginning with August 1955, and the plaintiffs by the Project Manager or other agents are entitled at any reasonable time to inspect said meters, or other measuring devices, meter charts and other records, as well as call for disinterested tests of said meters or devices at their expense, and at their option may also install and use extra check meters or devices of their own to test defendant's measurements.

The plaintiffs by the Project Manager or other agents shall deliver to defendant reasonably soon a verified statement showing the total intake of Project water at the Riverside Heading to irrigate Project lands served through that heading, and the portion or percentage, exactly if possible, but otherwise closely approximate, of said total quantity which moved by flowage in the river bed alongside defendant's plant, for each month of the five (5) years 1950 to 1954, and similar statements monthly on or before the tenth day of the succeeding month beginning with August 1955, and defendant at any reasonable time is entitled to inspect the original files and records used by plaintiffs in making above statements.

The plaintiffs and defendant, on request, also shall acquaint each other with any further information or record data either has at hand or can readily ascertain, not equally open to the knowledge of both, and which is reasonably pertinent to the purposes and execution of this part of the decree.

VII.

Injunction

That the defendant City of El Paso, its mayor, manager and members of its Public Service Board, superintendent of Water Works, and its agents and representatives, and the successors of each and all of them, be and they are hereby restrained and enjoined from taking water from the river bed of the Rio Grande or from the Franklin Canal, except in the manner and in accordance with the rights of said defendant as fixed and determined by this judgment and decree.

VIII.

Bridges

That the plaintiff United States of America is adjudged to be primarily liable and bound, contingent upon appropriations for the necessary outlays of money being made by Congress, to maintain bridges for the street crossings and one alley crossing over the Franklin Canal on South Santa Fe Street, South El Paso Street, South Oregon Street, South Mesa Street, South Stanton Street, South Kansas Street, South Campbell Street, South Florence Street, South Ochoa Street, South Virginia Street, South St. Vrain Street, Hill Street, Tays Street, Park Street, Fourth

Street, First Street, Laurel Street, Eucalyptus Street, Willow Street, (footbridge), South Piedras Street, South Raynor Street, South Estrella Street, South Grama Street, South Stevens Street, Hammet Boulevard, Boone Avenue, Evergreen Street, Washington Park East Road, Tobin Place, Alley east of Hadlock Place, Francis Street and Verde Avenue in the City of El Paso, Texas, where bridges built by said plaintiff were already located at the time and as enumerated in the ordinance of said City dated September 5, 1939, and amended November 9, 1939; and the plaintiff El Paso County Water Improvement District No. 1 is adjudged to be secondarily liable and bound to maintain the bridges aforesaid, that is if Congress fails to appropriae the necessary expense funds for the requirements from time to time under the aforesaid maintenance obligation; and the burden of such maintenance (excepting any damage caused by any particular act or omission in which the defendant is at fault and the plaintiffs are without fault), includes any and all reasonable replacements, rebuilding, restoration, enlargement, reinforcement and repairs of said bridges which may be required to keep at the specified crossings bridges suitable and adequate for the present and future needs of all common traffic at each of said locations, whatever the growth in such traffic density over the years; but said maintenance obligation shall remain in force at the respective crossings aforesaid only so long as the said streets and alley remain open and in use as such at said respective locations for public travel and also only while the plaintiffs herein or either of them continue to use said canal in its present location relative to any particular crossing or crossings herein specified.

Whenever the defendant is moved to claim that some particular improvement or work is required under the above maintenance obligation, it shall make and serve a written and detailed demand therefor upon the plaintiffs, and the plaintiffs, within thirty (30) days afterwards, shall notify the defendant in writing either that they accept or reject the demand, or if no reply is made within that time such failure shall constitute a rejection of the demand, and if after any such rejection of said demand the defendant elects to proceed with such improvement or work it may do so without prejudicing any claim it may decide to prosecute against the plaintiffs or either of them for recoupment of its reasonable costs and expenses so incurred, together with interest thereon; but if plaintiffs and the defendant agree that any given improvement or work is required under said maintenance obligation, then, unless same is in the nature of a public emergency, the undertaking shall be deferred for the time being, but not more than one year, unless the parties agree to a longer time, while the plaintiffs seek a sufficient appropriation from Congress, and if no such appropriation is made within that time the defendant, without waiting longer, may, at its election, proceed with such improvement or work without prejudicing any claim it may decide to prosecute against the plaintiffs or either of them for recoupment of its reasonable costs and expenses so incurred, together with interest, provided that if the defendant deems that the proposed improvement or work is in the nature of a public emergency, then even though the demand therefor has been accepted, it may proceed at any time with such improvement or work without prejudicing any claim it may decide to prosecute against the plaintiffs or either of them

for recoupment of its reasonable costs and expenses so incurred, together with interest, and in any of said instances interest at the rate of six per cent (6%) per annum shall run on the defendant's expenditures from the time thereof, respectively, except that if the defendant's demand was duly accepted and if the Court finds that such improvement or work was not in the nature of a public emergency, then interest shall not run on such recoupment liability for any earlier expenditures by the defendant until the expiration of the one year waiting period aforesaid.

IX.

Money Judgments

That the plaintiff El Paso County Water Improvement District No. 1 do have and recover from the defendant City of El Paso the sum of $17,200.36, including $15,603.50 principal and $1,596.86 interest to the date of this judgment, being unpaid indebtedness mostly charged for the use of Project facilities and claimed under the terms of the contract of August 10, 1949, and in small part for water under the contracts of February 18, 1941, and December 1, 1944; and that said plaintiff also have and recover from said defendant the further sum equal to $1.00 per acre foot, adjudged to be the reasonable sum and amount payable for the use of Project facilities in the carriage of water from the Canutillo site wells of the defendant to its water treatment plant, from November 1, 1954, to date hereof, but the subject of a reasonable rate for the use of said facilities in the carriage of said Canutillo well water hereafter is left as an open question.

It having been made known to the Court that when the hearing of this cause began on November 15, 1954, the defendant then also owed the sum of $9,413.47, for charges on water right lands under said contracts of February 18, 1941, and December 1, 1944, but in the meantime such water charges in said sum have been fully paid by the defendant, and consequently said item is not the subject of any present recovery in this judgment.

That the plaintiff the United States of America and the El Paso County Water Improvement District No. 1 failed to perform their bridge maintenance obligation at the Piedras Street crossing over the Franklin Canal, and at the Verde Street crossing over said canal, in the defendant City of El Paso, Texas, but the governing contingency bars primary liability of the plaintiff United States of America for said default, wherefore the secondary liability of the plaintiff El Paso County Water Improvement Distrct No. 1 therefor is in effect and, accordingly, the defendant City is hereby awarded judgment against the plaintiff District for the sum of $21,914.80, and also for the further sum of $16,740.15, together with interest on both of said sums from the second day of April 1953 to the date hereof at the rate of six per cent (6%) per annum, being the sum of $5,399.00, making a total of $44,053.95, for expenses incurred by said defendant in placing reasonable adequate bridges over the Franklin Canal at Piedras Street and at Verde Street, respectively, in the City of El Paso, but the money judgments recovered herein by the plaintiff District and the defendant City against each other shall be offset and the defendant City may have execution for the part of its recovery remaining unpaid, together

with legal interest on said balance from the date hereof until paid.

X.

That all relief prayed for by all parties, but not expressly granted herein, is hereby denied.

XI.

That all costs in this case be taxed one-half to plaintiff El Paso County Water Improvement District No. 1, and one-half to defendant City of El Paso.

Signed and Entered this 1st day of August, A. D. 1955.

(S.) JOS. B. DOOLEY,
United States District Judge,
Sitting by Assignment in the
Western District of Texas.

DEFENDANT'S MOTION TO CORRECT JUDGMENT.

(Filed August 12, 1955.)

Comes now Defendant, City of El Paso, and respectfully moves the Court to amend the judgment or decree entered in this case on August 2 in the following particulars:

I.

Change Lines 12 and 13, page 7 of said decree to read as follows:

"10% less than the average proportion thereof so mentioned for the particular month in the 10 years of 1945 through 1954 inclusive."

II.

Change Lines 25 and 26, page 8 of said decree to read as follows:

"Defendant's plant for each month of the 10 years, 1945 through 1954, inclusive, and similar statements monthly on or before".

III.

Defendant, City of El Paso earnestly urges that the last three years of the five year period from 1950 through 1954 were drought years, and if those years are used, the Defendant will not be able to obtain sufficient water from the river to offset the effluent placed by Defendant in the river.

IV.

Defendant further respectfully prays that there be added the following paragraph as the last paragraph of Section VI, which paragraph shall read as follows:

"The Defendant, City of El Paso, is given the right to divert at its water treatment plant on the Rio Grande River out of either the river bed or the Franklin Canal, an amount of water equivalent to the sewage outfall, treating each month independently as hereinbefore provided."

V.

Defendant states that it is important that the changes herein set out be made in the Court's judgment or decree in order that the City of El Paso may obtain from the river or Franklin Canal sufficient water to offset the effluent placed in the river by the City of El Paso.

Respectfully submitted,
ALLEN R. GRAMBLING,
HAROLD L. SIMS and H. E. BROCKMULLER,
By (S.) ALLEN R. GRAMBLING,
Attorneys for Defendant, City of El Paso.

A. R. Grambling, one of the attorneys for Defendant, certifies that he has this 12th day of August, 1955, mailed copy of the foregoing Motion to Eugene T. Edwards, attorney for Plaintiffs, 11th Floor Bassett Tower, El Paso, Texas.

(S.) ALLEN R. GRAMBLING.

MOTION BY PLAINTIFFS TO ALTER OR AMEND JUDGMENT.

(Filed August 12, 1955.)

Plaintiffs move the Court to alter or amend the judgment and decree heretofore entered in this action on August 2, 1955:

1. Insofar as said judgment, with reference to Rio Grande waters committed in prior right by the Rio

Grande Compact of 1938 to the service and use of the lands in the Rio Grande Project lying in the States of New Mexico and Texas, limits such waters to those impounded at the Elephant Butte and Caballo Reservoirs, because the federal supplemental filing of April ....., 1908 (Plaintiffs' Exhibit No. 1-a), expressly covers not only storage but also direct diversions, not only from the main stem of the river but also from its tributaries, with storage about nine miles west of Engle, New Mexico, and "diversion dams below in Palomas, Rincon, Mesilla and El Paso Valleys in New Mexico and Texas," all of which waters for nearly forty years have been put to beneficial use by the lands within the Rio Grande Reclamation Project in New Mexico and Texas which uses are recognized by the Rio Grande Compact of 1938, and the judgment should be amended to expressly include not only the waters of the Rio Grande impounded behind the dams mentioned, but also "all the unappropriated water of the Rio Grande and its tributaries" in New Mexico as of January 23, 1906 (the date of the original filing), including storm and flood waters and return flow and waste waters originating in New Mexico.

2. Insofar as said judgment undertakes to provide a method by which the defendant City of El Paso may take water pay free frim the bed of the Rio Grande at a point opposite the City's water treatment plant as an offset to compensate it for its sewage outfall discharged into the Rio Grande, because of each and all of the following:

(a) The provision as a whole is incapable of performance in that there are no known records showing the flow of the Rio Grande in the bed of the river

alongside the defendant's river pumping plant from which that proportion of the total gross diversions from the Rio Grande into the Riverside Heading which moved by flowage in the river bed alongside the defendant's river pumping plant during the five years of 1950 to 1954 or any other previous years can be calculated.

(b) The provision as a whole is incapable of performance in that even if such records were in existence and obtainable, the decree requires that calculations for the current month be made, which can be done only after the month has ended, then the computation for the month ended would be compared with the five year average for the month during the period 1950 to 1954, but after the computation and comparison with the average it is impossible to make delivery during the month that has terminated, and this part of the decree should be eliminated.

(c) The provision as a whole is incapable of performance in that the portion thereof which requires, under certain circumstances, that "the plaintiffs shall be bound to deliver offset water by other means and at their expense to defendant at its said plant promptly, equal to the additional quantity defendant could have taken from the river under the terms and restrictions hereof, but for the smaller quantity of water in the river, and in calculating the additional offset due the defendant in such event the deficiency in the quantity of river water during the month in question, determined by comparison with the five year average aforesaid, shall be spread equally over the number of days in the given month" is too elusive and indefinite even from a theoretical viewpoint, and from a prac-

tical viewpoint is impossible in that there is no method of determining what quantity of water should have been in the river bed at any given time, no records showing a five year average on any given day of any given month, and even if such records existed, no method of assembling data and effecting calculations therefrom with sufficient rapidity to carry out the purposes of the decree; and if such records were available and calculations from them could be made, the employment of additional water engineers by the Bureau of Reclamation would be necessary, and thereby impose an unreasonable burden on plaintiffs.

3. Plaintiffs ask the Court to so amend the decree with reference to the City's right to receive water from the Rio Grande that same shall provide that:

"The defendant City of El Paso shall be allowed to receive pay free that quantity of water from the bed of the Rio Grande as an offset to its sewage outfall into the river as elsewhere determined by this decree, only at such times and under such circumstances as shall in the determination of the United States of America be not detrimental to the rights of the landowners within the Rio Grande Project or the rights of the landowners within the Hudspeth County Conservation & Reclamation District No. 1, under their Warren Act contract with the United States of America."

because there is no other workable method of determining what waters are available for purposes of filling requirements of the decree with reference to the City's rights without injury to the Project

4. Plaintiffs move the Court to strike out the following clause commencing in the last line on page 5 and continuing in the first two lines of page 6 of the judgment, to-wit:

"or as a component of residue water delivered from Project works under contract for irrigation on outside lands,"

and to strike out the following clause in lines 15 and 16 of page 7 of the judgment:

"or for delivery from Project works to irrigate outside lands." because the Warren Act contract between the Hudspeth County Conservation & Reclamation District No. 1 and the United States (Plaintiffs' Exhibit No. 35-a), provides for delivery under that contract of only waters which are in excess of Project requirements, and the rights of said Hudspeth District are inferior and secondary to those of the Project, by reason of which any effluent being a component of residue water delivered to the Hudspeth District under that contract would necessarily be surplus to the needs of the Project, and therefore of no benefit to the Project, and it is inequitable to permit the City to take Project water to offset abandoned effluent which the Project cannot use.

5. Plaintiffs move the Court to add to Paragraph VI of the decree relating to effluent the following paragraph:

"Nothing in this decree with reference to the rights of the City of El Paso to take from the Rio Grande water as an offset to the City's sewage outfall into

the river shall ever be construed to require the United States to release water from Project storage in New Mexico for the purpose of supplying the City of El Paso with such offset water."

Because should this decree as worded ever be construed, under any circumstances, as requiring such release of stored water by the United States, this would give to the City a priority over landowners who are repaying to the government the costs of Project facilities in that at no time has a release of stored water been made to effect one delivery for the reason that it is economically extravagant and wasteful, and to release stored water from storage more than 100 miles above El Paso for the purpose only of delivering offset water to the City would result in such disproportionate losses from seepage, evaporation and transpiration while covering that length of river bed that no Court should permit it to take place.

LOUIS A. SCOTT,

1100 First National Building,
El Paso, Texas,

EUGENE T. EDWARDS,
Attorneys for Plaintiff El Paso County Water Improvement District No. 1.

11th Floor Bassett Tower,
El Paso, Texas.

HOLVEY WILLIAMS,
Assistant United States Attorney, For the United States of America,

By (S.) EUGENE T. EDWARDS.

United States Court House,
El Paso, Texas.

I have received this day a copy of the foregoing Motion by Plaintiffs to alter or amend Judgment, and accept the same as service on the Defendant City of El Paso.

This the 12th day of August, 1955.

(S.) ALLEN R. GRAMBLING,
(Allen R. Grambling),
Attorney of Record for Defendant.

AMENDED AND CORRECTED JUDGMENT AND DECREE.

(Filed September 28, 1955.)

In the United States District Court for the Western District of Texas, El Paso Division.

El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers, together with The United States of America, Plaintiffs,

v. Civil Action No. 1409

City of El Paso, Defendant.

Be It Remembered that on a former day, to-wit: November 15, 1954, came on to be heard the above cause before the Court without a jury, and the plaintiffs El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers, together with the

United States of America, appeared by their attorneys, and the defendant City of El Paso also appeared by its attorneys, and all parties having announced ready for trial, the Court proceeded to hear the pleadings, evidence and argument of counsel, and the trial continued from day to day until November 20, 1954, when the Court took the case under advisement until same was reopened for an additional hearing on June 9, 1955, and on said date all parties again appeared before the Court and the hearing continued until June 10, 1955, when the Court again took the case under advisement until August 2, 1955, when the original Judgment and Decree, dated August 1, 1955, was entered herein; whereupon in due time on August 12, 1955, the plaintiffs filed their motion to alter or amend and the defendant filed its motion to correct said original Judgment and Decree in certain parts and respects as therein stated, respectively, which motions having been duly heard heretofore on September 15, 1955, are now both sustained so far only as same fit the changes hereby made in that part of the original Judgment and Decree headed "Effluent Offset", being Section VI, but are now otherwise overruled, and accordingly on the date hereof and in lieu of said original Judgment and Decree, the Court renders this Amended and Corrected Judgment and Decree, whereby it is Now Ordered, Adjudged and Decreed as follows:

I.

Rio Grande Waters

That the waters of the Rio Grande to which the United States of America is entitled for the benefit of the Rio Grande Reclamation Project, pursuant to the

Reclamation Act of June 17, 1902, by virtue of the appropriation notices filed under the New Mexico Territorial Laws in January 1906 and April 1908, respectively, as well as any and all other waters impounded at the Elephant Butte and Caballo Reservoirs in New Mexico, are definitely committed in prior right by the Rio Grande Compact of 1938 between Colorado, New Mexico and Texas, approved by the Congress May 31, 1939, to the service and use of the lands in the said Project lying in the states of New Mexico and Texas, except the treaty quantity of 60,000 acre feet per annum allocated to Mexico, but this does not mean that said New Mexico filings govern as the source of rights to waters of the Rio Grande present in the river channel on the boundary of the State of Texas, including waters which have come down the river from New Mexico.

That the defendant City of El Paso is entitled to have and use for any purposes waters from the Rio Grande covered in the Permit issued to it by the Texas Board of Water Engineers, dated May 10, 1950, that is storm and flood waters, waters from local rains, return flow and waste waters, including return flow and waste waters from Project lands after the latter waters are no longer wanted for the uses of the Project, but the water entitlement of the defendant under said Permit is fully subject to the priority and superiority of the appropriative rights and entitlement held by the plaintiff United States of America and its assigns for the benefit and use of the Project and the owners of water right lands therein by force of the Compact and under "Certified Filing" No. 12 made by the said plaintiff through its representatives with the Texas Board of Water Engineers in the year

1914, to protect the appropriation of the Rio Grande waters made by Loomis and others in the year 1889 under the then water laws of Texas; but the City of El Paso, notwithstanding its river frontage and ownership of some riparian lands within the City, has no traditional riparian right to claim an independent and additional supply of water from the river for the general public and municipal requirements of the City; and it is further Adjudged that the channel of the Rio Grande along the boundary or inside of El Paso County is no part of the facilities belonging exclusively to the Project, but is subject to the ordinary use of a natural river bed under the laws of Texas, including use for the free carriage of water alike by the Project, District or City.

II.

Canutillo Well Water

That the City of El Paso may not pump water from its Canutillo wells into the bed of the Rio Grande above El Paso and thereafter take water, either directly from the river or by means of diversion from the Franklin Canal, at its water treatment plant or elsewhere, without reasonable and adequate adjustment for loss in transit caused by seepage, evaporation or transpiration, but, subject to such adjustment deductions, may do so without being liable to pay any toll or charge to the plaintiffs, unless the defendant to that end voluntarily makes use of Project facilities, in which event it must pay compensation therefor in a reasonable sum, until such time as the parties may fix the amount of such charge by written contract.

III.

Franklin Canal

That the City of El Paso Ordinance, dated November 9, 1939, recorded in Book Z-2, pages 448-49, of the Minutes of the City Council, making the obligation of the United States of America to maintain bridges at the various street crossings over the Franklin Canal hereafter mentioned contingent upon appropriations therefor being made by Congress, and transferring to the United States of America all the City's right, title and interest in the Franklin Canal, is valid and binding on the City; and the quitclaim deed, dated November 9, 1939, from the City of El Paso, as grantor, to the United States of America; as grantee, recorded in Book 660, Page 399, of the Deed Records of El Paso County, Texas, is valid and conveyed to the United States of America whatever interest, if any, the City had in the said Franklin Canal or other property described in the deed, and conveyed an easement for said canal right-of-way.

IV.

Contracts

That the contract dated February 18, 1941, between the United States of America and the City of El Paso and the El Paso County Water Improvement District No. 1, is in all respects valid and binding on all of the parties to it; and the contract dated December 1, 1944, between the United States of America and the City of El Paso, the El Paso County Water Improvement District No. 1 and the Elephant Butte Irrigation District is in all respects valid and binding on each of the three first named parties thereto, but the last

named party thereto is not a party in this suit; and the contract of August 10, 1949, between the El Paso County Water Improvement District No. 1 and the City of El Paso is valid and binding on the parties thereto in its aspect as a rental of Project works for use in delivery of water to the defendant.

V.

Use of Project Facilities

That the City of El Paso may not utilize the distribution facilities of the Rio Grande Project for carrying any part of its water without prior authority from the United States of America, and, specifically, shall not discharge water into the Vinton River lateral, Canutillo lateral wasteway or the Vinton river drain, or divert water from the Franklin Canal without first being duly authorized by the United States of America.

VI.

Effluent Offset

That the defendant City of El Paso, whenever there is Project water standing or flowing in the Rio Grande bed below the American Dam at any place or places along the river frontage of the defendant City, and while the defendant continues to discharge the municipal sewage effluent into the river bed at or near the present point of outfall upstream from the Riverside Heading and same is diverted into Project works and used to irrigate lands thereof, or in residue water delivered from the Project works under contract for irrigation on outside lands, shall have the right and be entitled to take and have by its own means and

pay free, at any such place or places on said City river front, but only from the adjacent river bed and without the use of Project facilities, an aggregate quantity of Project water within a maximum equal to the quantity of sewage effluent being discharged currently into the river bed, one day at a time, or double that amount in the contingency hereinafter stated, but this offset right is to stand on a calendar monthly basis, beginning August 1, 1955, whether or not the defendant effects all or any of such offset entitlement in some month or months, respectively, and each month shall be a new and separate period without any carry over or accumulation of offset entitlement from any given month to the next or any later month, and such offset must be made by the defendant daily between the intake and outfall of each day whenever there is Project water in the river bed sufficient for full or partial offset and the defendant has intake facilities at such place or places, or defendant will lose all further claim for any day up to the amount of available but untaken water, provided that so long as defendant is short of a full equalization offset in any current month, after an adjustment for any available water on a given day or days during the month, which the defendant failed to take within the daily limits, the daily offset by defendant from day to day during the remainder of that month may be twice the amount which otherwise would be the regular limit for such day, so far as the water supply in the river at the time will suffice; but so often as defendant falls short of full offset, or effects no offset, whatever the reason, even if beyond defendant's control, in any calendar month, said offset deficit shall always become canceled and held for naught to all intents and purposes at the end of such month by force hereof.

The defendant is not bound for any definite time to continue the discharge of sewage effluent into the river bed, but in event it hereafter makes other disposition of substantially all said effluent by sale or otherwise, the preceding paragraph hereof shall thereupon be annuled; but so long as same remains in force, the defendant at its expense shall accurately measure by meters or other standard devices, installed at the points of outfall and intake, and keep records of its daily outfall of effluent and intake of offset water, separately for each if more than one place of intake, and deliver to the Project Manager a verified report thereof in writing for such month on or before the tenth day of the succeeding month, beginning with August 1955, and the plaintiffs by the Project Manager or other agents are entitled at any reasonable time to inspect said meters, or other measuring devices, meter charts and other records, as well as call for distinterested tests of said meters or devices at their expense, and at their option may also install and use extra check meters or devices of their own to test defendant's measurements.

The plaintiffs and defendant, on request, also shall acquaint each other with any further information or record data either has at hand or can readily ascertain, not equally open to the knowledge of both, and which is reasonably pertinent to the purposes and execution of this part of the decree.

VII.

Injunction

That the defendant City of El Paso, its mayor, manager and members of its Public Service Board; superintendent of Water Works, and its agents and

representatives, and the successors of each and all of them, be and they are hereby restrained and enjoined from taking water from the river bed of the Rio Grande or from the Franklin Canal, except in the manner and in accordance with the rights of said defendant as fixed and determined by this amended and corrected judgment and decree.

VIII.

Bridges

That the plaintiff United States of America is adjudged to be primarily liable and bound, contingent upon appropriations for the necessary outlays of money being made by Congress, to maintain bridges for the street crossings and one alley crossing over the Franklin Canal on South Santa Fé Street, South El Paso Street, South Oregon Street, South Mesa Street, South Stanton Street, South Kansas Street, South Campbell Street, South Florence Street, South Ochoa Street, South Virginia Street, South St. Varin Street, Hill Street, Tays Street, Park Street, Fourth Street, First Street, Laurel Street, Eucalyptus Street, Willow Street, (footbridge), South Piedras Street, South Raynor Street South Estrella Street, South Grama Street, South Stevens Street, Hammett Boulevard, Boone Avenue, Evergreen Street, Washington Park East Road, Tobin Place, Alley east of Hadlock Place, Francis Street and Verde Avenue in the City of El Paso, Texas, where bridges built by said plaintiff were already located at the time and as enumerated in the ordinance of said City dated September 1, 1939, and amended November 9, 1939; and the plaintiff El Paso County Water Improvement District No. 1 is adjudged to be secondarily liable and bound

to maintain the bridges aforesaid, that is if Congress fails to appropriate the necessary expense funds for the requirements from time to time under the aforesaid maintenance obligation; and the burden of such maintenance (excepting any damage caused by any particular act or omission in which the defendant is at fault and the plaintiffs are without fault), includes any and all reasonable replacements, rebuilding, restoration, enlargement, reinforcement and repairs of said bridges which may be required to keep at the specified crossings bridges suitable and adequate for the present and future needs of all common traffic at each of said locations, whatever the growth in such traffic density over the years; but said maintenance obligation shall remain in force at the respective crossings aforesaid only so long as the said streets and alley remain open and in use as such at said repective locations for public travel and also only while the plaintiffs herein or either of them continue to use said canal in its present location relative to any particular crossing or crossings herein specified.

Whenever the defendant is moved to claim that some particular improvement or work is required under the above maintenance obligation, it shall make and serve a written and detailed demand therefor upon the plaintiffs, and the plaintiffs, within thirty (30) days afterwards, shall notify the defendant in writing either that they accept or reject the demand or if no reply is made within that time such failure shall constitute a rejection of the demand, and if after any such rejection of said demand the defendant elects to proceed with such improvement or work it may do so without prejudicing any claim it may decide to

prosecute against the plaintiffs or either of them for recoupment of its reasonable costs and expenses so incurred, together with interest thereon; but if plaintiffs and the defendant agree that any given improvement or work is required under said maintenance obligation, then, unless same is in the nature of a public emergency, the undertaking shall be deferred for the time being, but not more than one year, unless the parties agree to a longer time, while the plaintiffs seek a sufficient appropriation from Congress, and if no such appropriation is made within that time the defendant, without waiting longer, may, at its election, proceed with such improvement or work without prejudicing any claim it may decide to prosecute against the plaintiffs or either of them for recoupment of its reasonable costs and expenses so incurred, together with interest, provided that if the defendant deems that the proposed improvement or work is in the nature of a public emergency, then even though the demand therefor has been accepted, it may proceed at any time with such improvement or work without prejudicing any claim it may decide to prosecute against the plaintiffs or either of them for recoupment of its reasonable costs and expenses so incurred, together with interest, and in any of said instances interest at the rate of six percent (6%) per annum shall run on the defendant's expenditures from the time thereof, respectively, except that if the defendant's demand was duly accepted and if the Court finds that such improvement or work was not in the nature of a public emergency, then interest shall not run on such recoupment liability for any earlier expenditures by the defendant until the expiration of the one year waiting period aforesaid.

IX.

Money Judgments

That the plaintiff El Paso County Water Improvement District No. 1 do have and recover from the defendant City of El Paso the sum of $17,351.18, including $15,603.50 principal and $1,747.68 interest to the date of this amended and corrected judgment, being unpaid indebtedness mostly charged for the use of Project facilities and claimed under the terms of the contract of August 10, 1949, and in small part for water under the contracts of February 18, 1941, and December 1, 1944; and that said plaintiffs also have and recover from said defendant the further sum equal to $1.00 per acre foot, adjudged to be the reasonable sum and amount payable for the use of Project facilities in the carriage of water from the Canutillo site wells of the defendant to its water treatment plant, from November 15, 1954, to date hereof, but the subject of a reasonable rate for the use of said facilities in the carriage of said Canutillo well water hereafter is left as an open question.

It having been made known to the Court that when the hearing of this cause began on November 15, 1954, the defendant then also owed the sum of $9,413.47, for charges on water right lands under said contracts of February 18, 1941, and December 1, 1944, but in the meantime such water charges in said sum have been fully paid by the defendant, and consequently said item is not the subject of any present recovery in this judgment.

That the plaintiff the United States of America and the El Paso County Water Improvement District No.

1 failed to perform their bridge maintenance obligation at the Piedras Street crossing over the Franklin Canal, and at the Verde Street crossing over said canal, in the defendant City of El Paso, Texas, but the governing contingency bars primary liability of the plaintiff United States of America for said default, wherefore the secondary liability of the plaintiff El Paso County Water Improvement District No. 1 therefor is in effect and, accordingly, the defendant City is hereby awarded judgment against the plaintiff District of the sum of $21,914.80, and also for the further sum of $16,740.15, together with interest on both of said sums from the second day of April 1953 to the date hereof at the rate of six percent (6%) per annum, being the sum of $5,772.64, making a total of $44,427.59, for expenses incurred by said defendant in placing reasonably adequate bridges over the Franklin Canal at Piedras Street and at Verde Street, respectively, in the City of El Paso, but the money judgments recovered herein by the plaintiff District and the defendant City against each other shall be offset and the defendant City may have execution for the part of its recovery remaining unpaid, together with legal interest on said balance from the date hereof until paid.

X

That all relief prayed for by all parties, but not expressly granted herein, is hereby denied.

XI

That all costs in this case be taxed one-half to plaintiff El Paso County Water Improvement District No. 1, and one-half to defendant City of El Paso.

Signed and Dated this 28th day of September, A. D. 1955.

JOS. B. DOOLEY,
United States District Judge,
Sitting by Assignment in the
Western District of Texas.

NOTICE OF APPEAL BY PLAINTIFFS FROM PARTS OF JUDGMENT.

(Filed November 25, 1955.)

Notice is hereby given that the El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs, W. L. Summers, and the United States of America, plaintiffs in the above named cause, appeal to the Court of Appeals for the Fifth Circuit from certain parts, and none other, of the final judgment entered in this action on September 28, 1955, described in such action as the "Amended and Corrected Judgment and Decree" bearing date September 28, 1955, such parts from which the appeal is taken being:

I.

Paragraph I of the decree entitled "Rio Grande Waters", insofar as it adjudges that the water of the Rio Grande to which the United States of America is entitled for the benefit of the Rio Grande Project and that belonging to Texas is definitely committed to the service of the Rio Grande Project only by force of the Rio Grande Compact of 1938 between

Colorado, New Mexico and Texas, and insofar as it fails to adjudge that all of the waters of the Rio Grande and its tributaries in New Mexico unappropriated under the general appropriation laws of the Territory at the time of the filing by the United States of the Notice of January 23, 1906, supplemented by the Notice of April ..., 1908, were by such notices definitely committed before May 31, 1939, the effective date of the Rio Grande Compact, to the primary service of the Rio Grande Project, including that portion thereof lying within the State of Texas, by force of the Reclamation Act of June 17, 1902, as extended to Texas, in conjunction with the special Territorial laws of New Mexico relative to the acquisition of water rights by the United States for irrigation works, New Mexico Enatling Act, Article 21, Section 7 of the Constitution of New Mexico, and the Law of Texas, including its statutes

2.

Paragraph IV of the decree entitled "Contracts," insofar as it relates to the contract of August 10, 1949, and fails to adjudge and decree that said contract is valid and binding on the parties thereto in all of its provisions as well as in its aspect as a rental of Project works for use in delivery of water to the defendant, and insofar as said decree fails to adjudge that the stipulation of December 1, 1949 (Plaintiffs' Exhibit No. 33), between the City of El Paso, El Paso County Water Improvement District No. 1, the United States of America and others not parties to this suit, is valid and binding on the plaintiffs and defendant herein, and also insofar as said decree fails to adjudge that the contract between the City of El Paso

and the El Paso County Water Improvement District No. 1, dated June 22, 1950 (Plaintiffs' Exhibit No. 34), is valid and binding on both parties.

3.

Paragraph VI of the decree entitled "Effluent Offset," insofar as it adjudges that the defendant City of El Paso shall have the right and be entitled to take "pay-free" from the river bed on the City water front an "aggregate quantity of Project water within a maximum equal to the quantity of sewage effluent being discharged currently into the river bed."

4.

Paragraph VIII of the decree entitled "Bridges," insofar as it fails to adjudge that the obligation of the plaintiff El Paso County Water Improvement District No. 1 with reference to bridges across the Franklin Canal is limited to the furnishing of funds for the maintenance of the bridges therein described, whenever such funds are not appropriated by Congress or furnished by the Federal Government or its agents, and that such obligation to furnish funds to maintain excludes the obligation to furnish funds for the erection of new structures, and is limited to the obligation of furnishing funds for the reparing, keeping up and preserving those bridges and insofar as it fails to adjudge that the obligation of the United States with reference to such bridges is limited to the maintenance thereof, contingent upon appropriations being made therefor by Congress, and that such obligation to maintain excludes the obligation to furnish funds for the erection of new structures and is limited to

the obligation of repairing, keeping up and preserving such bridges, and insofar as the decree affirmatively adjudges with reference to both plaintiffs that the burden of maintenance "includes any and all reasonable replacements, rebuilding, restoration, enlargement, reinforcement and repairs of said bridges which may be required to keep . . . bridges suitable and adequate for the present and future needs of all common traffic at each of said locations, whatever the growth in such traffic density over the years," and insofar as the decree in Paragraph VIII limits the time within which the plaintiffs must secure a Congressional appropriation for bridge construction to not more than one year, after which the defendant City of El Paso may rebuild the bridges and prosecute its claim for recoupment against plaintiffs, and insofar as said Paragraph VIII fails to adjudge that in situations where the plaintiffs and defendant may disagree on the necessity for repairs or rebuilding that such work as defendant may undertake shall be in accordance with plans and engineering data that will result in a structure which, when completed, will not interfere with the free flow of water through the Franklin Canal, and that such work, except in case of emergency, shall be carried on only during the non-irrigation season when no water in substantial quantities is passing through the Canal.

5.

Paragraph IX of the decree entitled "Money Judgments," insofar as it adjuudges that the plaintiffs have failed to perform their bridge maintenance obligation at the Piedras and Verde Street crossing over the Franklin Canal, and insofar as it is adjudged that "the governing contingency bars primary liability of the plaintiff, United States of America for said de-

fault, wherefore the secondary liability of the plaintiff El Paso County Water Improvement District No 1 therefor is in effect," and insofar as it awards to the defendant City of El Paso a money judgment of $44,427.59 (less offsets) against the plaintiff District for expenses incurred by defendant in rebuilding bridges over the Franklin Canal at Piedras and Verde Streets.

6.

Paragraph X of the decree wherein "all relief prayed for by all parties, but not expressly granted herein, is hereby denied."

LOUIS A. SCOTT,
1100 First National Building,
El Paso, Texas.

EUGENE T. EDWARDS,
11th Floor, Bassett Tower,
El Paso, Texas.

Attorneys for Appellant El Paso County Water Improvement District No. 1 an all individual appellants.

By (S.) EUGENE T. EDWARDS

RUSSELL B. WINE,
U. S. Attorney.

(S.) HOLVEY WILLIAMS,
(Holvey Williams),
Assistant United States Attorney for the Western District of Texas, United States Court House, El Paso, Texas.

Attorney for Appellant United States of America

NOTICE OF CROSS-APPEAL BY DEFENDANT FROM PARTS OF JUDGMENT.

(Filed November 26, 1955.)

Notice is hereby given that the City of El Paso, Defendant in the above styled and numbered suit, hereby appeals to the United States Court of Appeals for the Fifth Circuit from a portion of the judgment entered by the United States District Court for the Western District of Texas at El Paso on September 28, 1955 in the above styled and numbered suit, as set out in the Designation of Points on Appeal by Defendant, a copy of which is attached hereto and made a part hereof.

ALLEN R. GRAMBLING, HAROLD L. SIMS and H. E. BROCKMOLLER.

By (S.) ALLEN R. GRAMBLING.
Attorneys for Appellee, City of El Paso.

El Paso, Texas.

A. R. Grambling, one of the attorneys for Appellee and Cross Appellant, City of El Paso, certifies that he has this 26th day of November, A. D. 1955, mailed three copies of the foregoing Notice of Appeal to Mr. Eugene T. Edwards, 11th Floor Bassett Tower, El Paso, Texas, attorney for Appellants.

(S.) A. R. GRAMBLING

COST BOND BY APPELLANTS OTHER THAN THE UNITED STATES.

(Filed November 25, 1955.)

Know All Men By These Presents: That we, El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers as principals, and the other whose name is undersigned as surety, are held and firmly bound unto the City of El Paso, a municipal corporation, defendant in the above styled and numbered cause, in the full and just sum of Two Hundred and Fifty Dollars ($250.00) to be paid to the said City of El Paso, its successors and assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of November, 1955.

Whereas, on September 28, 1955, in an action pending in the United States District Court for the Western District of Texas, El Paso Division, between El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers, together with the United States of America as plaintiffs, and the City of El Paso as defendant in Civil Action No. 1409 on the docket of said Court, final judgment was rendered and entered in the nature of a declaratory adjudication between the parties as to certain water rights in waters of the Rio Grande, sewage effluent, and responsibility for maintenance of bridges and other con-

tractual obligations between the parties, regarded as contrary to the interests of those whose names are undersigned as principals who have joined with all other plaintiffs in the filing of a notice of appeal from certain portions of said final judgment to the United States Court of Appeals for the Fifth Circuit:

Now, Therefore, the condition of this obligation is such, that if the said El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers, and the United States of America shall prosecute said appeal to effect, and answer all costs if they fail to make good their plea, then the above obligation shall be null and void, otherwise to remain in full force and effect.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO 1,
L. D. McCOMAS.
FRANCIS J. WARNOCK.
J. S. SAMPLES.
MARION BRIGGS.
W. L. SUMMERS.
Principals.

By (S) EUGENE T. EDWARDS.
Their Attorney of Record and Agent.

GENERAL CASUALTY COMPANY OF AMERICA.
SEATTLE, WASHINGTON.
Surety.

By (S.) LOUIS A. SCOTT, JR.
(Louis A. Scott, Jr.).
Attorney in Fact.

(Seal)

BOND FOR COSTS ON APPEAL.

(Filed November 26, 1955.)

We, the undersigned, jointly and severally, acknowledge that we and our personal representatives are bound to pay to El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers, together with the United States of America, Plaintiffs, the sum of $250.00.

The condition of this bond is that whereas the Defendant, City of El Paso, has appealed to the United States Court of Appeals for the Fifth Circuit by notice of appeal filed November 26 1955, from a portion of the judgment of this Court entered on September 28, 1935, if the Defendant shall pay all costs adjudged against it if the appeal is dismissed or the judgment affirmed or such costs as the Appellate Court may award if the judgment is modified, then this bond is to be void, but if the Defendant fails to perform this condition, payment of the amount of this bond shall be due forthwith.

CITY OF EL PASO,
By (S.) TOM E. ROGERS,
Mayor, El Paso, Texas,
Principal.

(Seal) Mayor, El Paso, Texas.

Attest:
S. J. M. HERRERA,
City Clerk.

AMERICAN EMPLOYERS' INSURANCE COMPANY,
By (S.) J. C. ECHLIN,
(J. C. Echlin),
Attorney-in-Fact,
Surety.

(Seal)

Signed and Acknowledged before me this 26 day of November, A. D. 1955.

(S.) JOHN P. CAMP,
(John P. Camp),
Notary Public in and for El Paso County, Texas.

(Seal)

My commission expires June 1, 1957.

DESIGNATION OF POINTS OF APPEAL

(Filed November 25, 1955.)

El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs, W. L. Summers, and the United States of America, plaintiffs in the above styled and numbered cause, and appellants herein, intend to rely on appeal of the above entitled cause upon the following points:

1.

The error of the Court in concluding as a matter of law in his opinion, and in so adjudging in Paragraph I of the amended and corrected judgment and decree, that the water of the Rio Grande to which the United States of America is entitled for the benefit of the Rio Grande Project and that belonging to Texas is definitely committed to the service of the Rio Grande Project only by force of the Rio Grande Compact of 1938 between Colorado, New Mexico and Texas approved by the Congress May 31, 1939.

2.

The error of the Court in failing to adjudge that all of the waters of the Rio Grande and its tributaries in New Mexico, unappropriated under the general appropriation laws of that Territory at the time of the filing by the United States of the Notice of January 23, 1906, supplemented by the Notice of April ...., 1908 (both included in Plaintiffs' Exhibit No. 1-a), were by such notices definitely committed, before May 31, 1939, the effective date of the Rio Grande Compact, to the primary service of the Rio Grande Project, including that portion thereof lying within the State of Texas, by force of the Reclamation Act of June 17, 1902 (32 Stat. 388), as extended to Texas by Act of February 25, 1905 (33 Stat. 814), and Act of June 12, 1906 (34 Stat. 259), in conjunction with the special Territorial laws of New Mexico relating to acquisition of water rights by the United States for irrigation works, the New Mexico "Enabling Act" (36 Stat. 557), Article 21, Section 7, of the Constitution of New Mexico, and the law of Texas, including its statutes.

3.

The error of the Court in the paragraph of the opinion dealing with sewage effluent, with reference to riparian and storm waters, in his conclusion and finding that "the two types of water are impounded indiscriminately and commingled behind Elephant Butte Dam."

4.

The error of the Court in failing to find and conclude as a matter of law, and adjudge in the amended and corrected judgment and decree, that the contract dated August 10, 1949, between the City of El Paso and the El Paso County Water Improvement District No. 1, executed by them with the approval of the Secretary of the Interior (Plaintiffs' Exhibit No. 32), is valid and binding on both parties thereto, not only in its aspect as a rental of Project works for use in delivery of water to the defendant (as found and adjudged by the Court in Paragraph IV of the amended and corrected judgment), but also as to each and every other provision thereof, and particularly as to those provisions relinquishing the City's claim relative to effluent voluntarily discharged by it into the river.

5.

The error of the Court in finding and concluding in his opinion with reference to the above mentioned contract of August 10, 1949, that "Under the circumstances mirrored in this contract, there was nothing the plaintiffs had to sell, except a rental use of the Project works."

6.

The error of the Court in failing to adjudge in the amended and corrected judgment and decree that the stipulation of December 1, 1949, (Plaintiffs' Exhibit No. 33), between the City of El Paso, El Paso County Water Improvement District No. 1, the United States

of America and others not parties to this suit, is valid and binding on plaintiffs and defendant herein.

7.

The error of the Court in failing to adjudge that the contract between the City of El Paso and the El Paso County Water Improvement District No. 1, dated June 22, 1950 (Plaintiffs' Exhibit No. 34), is valid and bindnig on both parties.

8.

The error of the Court in concluding in his opinion relative to the City's taking water from the Rio Grande bed as an offset to sewage effluent discharged by the City of its own volition into the river bed, that "The fair and equitable rule is that the City for the foreseeable future should be entitled to make direct diversions for municipal use from the river, without having to pay for such water so long as such diversions are less in volume than the outfall to the river."

9.

The error of the Court in adjudging in Paragraph VI of the amended and corrected judgment and decree with reference to "effluent offset" that the City of El Paso shall have the right and be entitled to take "pay free" from the river bed on the City water front an "aggregate quantity of Project water within a maximum equal to the quantity of sewage effluent being discharged currently into the river bed."

10.

The error of the count in concluding in his opinion with reference to the obligation of the grantee in the quitclaim deed from the City of El Paso to the United States of America (Plaintiffs' Exhibit No. 18), to "maintain" bridges at certain named locations, that the duty to maintain the bridges in question also demands "all reasonable rebuilding, restoration, enlargement, reinforcement, and repairs, which may be required," and in carrying such conclusion forward into Paragraph VIII of the amended and corrected judgment and decree by holding therein that the burden of such maintenance "includes any and all reasonable replacements, rebuilding, restoration, enlargement, reinforcement and repairs of said bridges which may be required to keep at the specified crossings bridges suitable and adequate for the present and future needs of all common traffic at each of said locations, whatever the growth in such traffic density over the years."

11.

The error of the Court in Paragraph VIII of the amended and corrected judgment and decree relating to bridges, in limiting the time within which the plaintiffs must secure a Congressional appropriation for bridge construction to not more than one year, after which the defendant may rebuild the bridges and prosecute its claim for recoupment against plaintiffs.

12.

The error of the Court in failing to adjudge and decree, in Paragraph VIII of the amended and cor-

rected judgment and decree relative to bridges in situations wherein the plaintiffs and defendant may disagree on the necessity for repairs or rebuilding thereof, that such work as the defendant may undertake on such bridges shall be in accordance with plans and engineering data that will result in a structure which, when completed, will not interfere with the free flow of water through the Franklin Canal, and that such work, except in case of emergency, shall be carried on only during the non-irrigation season when no water in substantial quantities is passing through the Canal.

13.

The error of the Court in Paragraph IX of the amended and corrected judgment and decree in adjudging that plaintiffs have failed to perform their bridge maintenance obligation at the Piedras Street and Verde Street crossings over the Franklin Canal.

14.

The error of the Court in Paragraph IX of the amended and corrected decree wherein it is adjudged that "the governing contingency bars primary liability of the plaintiff United States of America for said default, wherefore the secondary liability of the plaintiff El Paso County Water Improvement District No. 1 therefor is in effect."

15.

The error of the Court in awarding the defendant City of El Paso judgment against the plaintiff District for the sum of $44,427.59.

16.

The error of the Court in denying to plaintiffs all relief prayed for by them except such as was not expressly granted in the amended and corrected judgment and decree, as set forth in Paragraph X thereof.

LOUIS A. SCOTT,
1100 First National Building,
El Paso, Texas.

EUGENE T. EDWARDS,
11th Floor, Bassett Tower,
El Paso, Texas.

Attorneys for Appellant El Paso County Water Improvement District No. 1, and all individual appellants,

By (S.) EUGENE T. EDWARDS,
(S.) HOLVEY WILLIAMS,
(Holvey Williams),
Assistant United States Attorney for the Western District of Texas, United States Court House, El Paso, Texas,
Attorney for Appellant United States of America.

Proof of Service.

I certify that a copy of the foregoing Designation of Points of Appeal has been served on the defendant, City of El Paso, by personal delivery to Allen R.

Grambling, attorney of record for the defendant in the above cause.

Dated this 25 day of November, 1955.

(S.) EUGENE T. EDWARDS.

DESIGNATION OF POINTS ON APPEAL BY DEFENDANT.

(Filed November 26, 1955.)

City of El Paso, Defendant in the above styled and numbered cause, and Appellee and Cross Appellant in the United States Court of Appeals, intends to rely on its Cross Appeal in the above entitled cause upon the following points:

I.

The error of the Court in holding that the waters of the Rio Grande are definitely committed by prior right under the Rio Grande Compact of 1938 between Colorado, New Mexico and Texas, approved by the Congress May 31, 1931 to the service and use of the lands in the Rio Grande Reclamation Project lying in the States of New Mexico and Texas.

II.

The error of the Court in holding that the water entitlement of the City of El Paso, under the permit issued to it by the Texas Board of Water Engineers, dated May 10, 1950, under said permit is fully subject

to the priority and superiority of the appropriative rights and entitlement held by the United States of America and its assigns for the use and benefit of the Project and the owners of water right lands therein by force of the Compact.

III.

The error of the Court in holding that the Defendant, City of El Paso, notwithstanding its river frontage and ownership of some riparian lands within the City, has no traditiinal riparian right to claim an independent and additional supply of water from the Rio Grande River for the general public and municipal requirements of said City.

IV.

The error of the Court in holding that the Defendant, City of El Paso, may not pump water from its Canutillo wells into the bed of the Rio Grande above El Paso, and thereafter take water either directly from the river or by means of diversion from the Franklin Canal at its water treatment plant or elsewhere without being liable to pay for the use of Project facilities when such water from the Canutillo wells is placed in the Canal by Plaintiffs.

V.

The error of the Court in holding that the Defendant's Ordinance dated November 9, 1939 is valid and binding on the City, and in holding further that the quitclaim deed dated November 9, 1939 from the City of El Paso to the United States of America is

valid, and conveyed to the United States of America whatever interest the City had in said Franklin Canal, and conveyed an easement for said Canal right of way.

VI.

The error of the Court in holding that the contract dated February 18, 1941 between the United States of America and the City of El Paso, and the El Paso County Water Improvement District No. One is in all respects valid and binding on all of the parties to it.

VII.

The error of the Court in holding that the contract dated December 1, 1944 between the United States of America and the City of El Paso, the El Paso County Water Improvement District No. One and the Elephant Butte Irrigation District, is in all respects valid and binding on each of the first three named parties thereto.

VIII.

The error of the Court in holding that the contract dated August 10, 1949 between El Paso County Water Improvement District No. One and the City of El Paso is valid and binding on the parties thereto in its aspect as the rental of Project works for use in delivery of water to the Defendant, City of El Paso.

IX.

The error of the Court in holding that the Defendant, City of El Paso, may not utilize the distribution

facilities of the Rio Grande Project for carrying any part of its water, including water from the Canutillo wells without prior authority from the United States of America, and in holding that the City of El Paso shall not discharge water into the Vinton river lateral, Canutillo lateral wasteway, or the Vinton river drain, or divert water from the Franklin Canal without first being duly authorized by the United States of America.

X.

The error of the Court in enjoining the Defendant, City of El Paso, its Mayor, Manager and members of its Public Service Board, Superintendent of Water Works, and its agents and representatives, and the successors of each and all of them, in taking water from the river bed of the Rio Grande, or from the Franklin Canal except in the manner, and in accordance with the rights of said Defendant, City of El Paso as fixed and determined by said decree.

XI.

The error of the Court in rendering judgment in favor of Plaintiff, El Paso County Water Improvement District No. One against Defendant, City of El Paso, for the sum of $17,351.18 for use of Project facilities under the Contract of August 10, 1949, and partly under the Contracts of February 18, 1941 and December 1, 1944, and in holding that Plaintiff, El Paso County Water Improvement District No. One is entitled to judgment against Defendant, City of El Paso, for a sum equal to $1.00 per acre foot as a reasonable charge for the use of Project facilities in

the carriage of water from the Canutillo wells of Defendant to its water treatment plant from November 1, 1954 to the date of said judgment.'

ALLEN R. GRAMBLING,
HAROLD L. SIMS and H. E. BROCKMOLLER,
By (S.) A. R. GRAMBLING,
Attorneys for Appellee and Cross Appellant, City of El Paso.

A. R. Grambling, one of the attorneys for Appellee and Cross Appellant, City of El Paso, certifies that he has this 26th day of November, A. D. 1955, mailed three copies of the foregoing Designation of Points of Appeal to Mr. Eugene T. Edwards, 11th Floor Bassett Tower, El Paso, Texas, attorney for Appellants.

(S.) A. R. GRAMBLING.

ORDER AS TO ORIGINAL EXHIBITS.

(Filed December 2, 1955.)

The parties hereto having agreed between themselves by stipulation in writing which is a part of the record in this case, (Agreement As To Transcript of Record), that certain exhibits offered in evidence are, on account of their nature, not subject to being copied into the record, and that such original exhibits may, under order of the trial Court, be transmitted to the Court of Appeals for inspection by that Court, and this Court being of the opinion and now finding that such exhibits are in fact of character, kind and con-

tents not suitable to being copied into the record but are of importance sufficient to require their being available for inspection by the appellate Court in lieu of copies;

Therefore, pursuant to Federal Rule of Civil Procedure 75(i), it is ordered as follows:

First. The clerk of this Court shall assemble in convenient form, in suitable packages or containers properly identified, the following described original exhibits and transmit them to the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, in lieu of copies:

Plaintiffs' Exhibits.

No. 1, No. 1a, being an exemplified copy of the proceedings by the United States of America in the Territory of New Mexico for the purpose of securing water supply for the Rio Grande Project and for delivery to Mexico under Treaty, which exhibit in addition to its exemplication consists of six parts, being:

1. Notice of Jan. 23, 1906.

2. Supplemental Notice of April . . . 1908.

3. Plans and specifications for Leasburg Unit

4. General map of Project

5. Cross-section of Rio Grande at Elephant Butte

6. Proof of completion of works.

Also Plaintiffs' Exhibits Nos. 38 to 87, both inclusive (photographs), 150, 152, 153, and 154.

Defendant's Exhibits.

Nos. 3 to 18, both inclusive (graphs), 21 to 28, both inclusive (photographs), 31 (photograph), 36, 37, 38 to 48 inclusive (photographs), 76, and 81 to 85, both inclusive (photographs).

Second. On transmission to the United States Court of Appeals for the Fifth Circuit, all of the foregoing original papers and exhibits shall be subject to such further orders as that Court may deem proper.

Dated this 2nd day of December, 1955.

(S.) JOS. B. DOOLEY.
United States District Judge.

Approved:

(S.) EUGENE T. EDWARDS,
(Eugene T. Edwards),
For Plaintiff District and all individual plaintiffs.

(S.) HOLVEY WILLIAMS.
(Holvey Williams),
For Plaintiff, U.S.A.

(S.) HAROLD L. SIMS.
For Defendant

AGREEMENT AS TO TRANSCRIPT OF RECORD.

(Filed December 2, 1955.)

It is hereby stipulated by and between the plaintiffs, El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs, W. S. Summers, and the United States of America, on the one part, and the defendant, City of El Paso, on the other part, all acting through their respective attorneys whose names are undersigned, that the following are designated as those parts and portions of the records and proceedings in the above case to be included in the record on appeal and which shall constitute the record on appeal:

I.

Amended Complaint, filed January 22, 1953.

II.

Amended Answer and Counter-Claim of defendant, City of El Paso, filed November 17, 1953.

III.

Plaintiffs' Reply to Defendant's Counter-Claim.

IV.

Transcript of all of the evidence, including all oral testimony, and that portion of the deposition of Mayor Fred Hervey which was read in evidence, and in-

cluding the Plaintiffs' Request for Admissions of Facts, and the Plaintiffs' request for Admission of Genuineness of Documents, and the Defendant's Answers to Plaintiffs' Request for Admissions of Facts, and the Defendant's Answers to Plaintiffs' Request for Admissions of Genuineness of Documents which were read in evidence.

In connection with the exhibits, it is agreed as follows:

Plaintiffs' Exhibit No. 1 is a map showing the area occupied by the Rio Grande Federal Reclamation Project, and is not subject to being copied in the record, and the original exhibit may, under order of Court, be transmitted to the Court of Appeals for inspection by that Court.

Plaintiffs' Exhibit No. 1-a is an exemplified copy of the proceedings by the United States of America in the Territory of New Mexico for the purpose of securing a water supply for the Rio Grande Reclamation Project and for delivery to Mexico under the Treaty of 1906, and consists of six parts, being:

1. Notice of January 23, 1906.

2. Supplemental Notice of April .... 1908.

3. Plans and specifications for the Leasburg Unit.

4. General map of Project.

5. Cross-section of Rio Grande at Elephant Butte site.

6. Proof of completion of works.

As an entire exhibit, plaintiffs' Exhibit No. 1-a is not adaptable to being copied in the record, and may, under order of Court, be set up as an original to the Court of Appeals for inspection by that Court; but items numbered 1 and 2 above, being the Notice of January 23, 1906, and the Supplemental Notice of April ..., 1908, shall, for convenience, be copied by the reporter into the record.

Plaintiffs' Exhibit No. 2 is a certified copy of New Mexico Territorial Laws, Section 22, Chapter 102, Laws of 1905, and Section 40, Chapter 49, Laws of 1907, and is to be copied in the record.

Plaintiffs' Exhibit No. 3 is a copy of 34 Statutes at Large 2953, being the Convention of May 21, 1906, between the United States and Mexico, and is to be copied into the record.

Plaintiffs' Exhibit No. 4 is a certified copy of U. S. Certified Filing No. 123, with the Texas Board of Water Engineers in 1914, respecting the Loomis Appropriation of 1889, and is to be copied in the record.

Plaintiffs' Exhibit No. 5 is a certified copy of the Order of the Commissioners' Court, May 22, 1917, establishing the El Paso County Water Improvement District No. 1 by metes and bounds, and is to be copied in the record.

Plaintiffs' Exhibit No. 6 is a certified copy of the Order of the Commissioners' Court of El Paso County, February 10, 1919, establishing El Paso County Conservation and Reclamation District No. 2 by metes and bounds, and is to be copied in the record.

Plaintiffs' Exhibit No. 7 is certified copies of proceedings by the two districts for consolidation, October 1, 1920, and is to be copied in the record.

Plaintiffs' Exhibit No. 8 is the Rio Grande Compact of March 18, 1938, and is to be copied in the record.

Plaintiffs' Exhibit No. 9 is a certified copy of the Water Appropriation by Loomis and others for the Franklin Canal under the Texas Appropriation Acts of 1889, and is to be copied in the record.

Plaintiffs' Exhibit No. 10 is a certified copy of Amended Appropriation by Loomis and others, July 1889, and is to be copied in the record.

Plaintiffs' Exhibit No. 11 is a certified copy of deed from Loomis and others to El Paso Irrigation Company, and is to be copied in the record.

Plaintiffs' Exhibit No. 12 is a certified copy of deed from Turney, Master Commissioner, to Worthington, April 9, 1898, and is to be copied in the record.

Plaintiffs' Exhibit No. 13 is a certified copy of deed from Worthington to Franklin Irrigation Company, and is to be copied in the record.

Plaintiffs' Exhibit No. 14 is certified copy of deed from the Franklin Irrigation Company to the United States of America, and is to be copied in the record.

Plaintiffs' Exhibit No. 15 consists of Sections 1, 2, 33, 35, 36, 37, 56, 92, 93 and 120 of the City Charter of the City of El Paso, and those sections and none

other are to be copied into the record as Plaintiffs' Exhibit No. 15.

Plaintiffs' Exhibit No. 16 is a certified copy of City Ordinance of September 5, 1939, conveying to the United States of America all of the right, title and interest of the city in right-of-way occupied by Franklin Canal, and is to be copied in the record.

Plaintiffs' Exhibit No. 17 is a certified copy of City Ordinance of November 9, 1939, recorded in Book Z-2, pages 448-449, and is to be copied into the record.

Plaintiffs' Exhibit No. 18 is a certified copy of quitclaim deed from the City of El Paso to United States of America, recorded in Book 660, page 399, dated November 9, 1939, and is to be copied in the record.

Plaintiffs' Exhibit No. 19 is a certified copy of certain Court papers in the case of Mendoza vs. City of El Paso, No. 53430 on the docket of the Forty-First District Court of El Paso County, and will be copied in the record.

Plaintiffs' Exhibit No. 20 is a certified copy of the contract between the United States of America and El Paso County Water Improvement District No. 1, January 17, 1920, and is to be copied in the record.

Plaintiffs' Exhibit No. 21 is an exemplified copy of New Mexico's judgment approving contract of January 17, 1918, between Elephant Butte Irrigation District and United States of America, and is to be be copied in the record.

Plaintiffs' Exhibit No. 22 is contract between United States of America and El Paso County Water Improvement District No. 1, October 12, 1922, and is to be copied in the record.

Plaintiffs' Exhibit No. 23 is contract between the United States of America and El Paso County Water Improvement District No. 1, November 10, 1937, and is to be copied in the record.

Plaintiffs' Exhibit No. 24 is exemplified copy of New Mexico's judgment approving Elephant Butte Irrigation Contract of November 9, 1937, with the United States of America, and is to be copied in the record.

Plaintiffs' Exhibit No. 25 is certified copy of the judgment of the 65th District Court of El Paso County, Texas, in Cause No. 19944, in Rem, and is to be copied in the record.

Plaintiffs' Exhibit No. 26 is certified copy of judgment of 41st District Court of El Paso County, November 8, 1939, in Cause No. 46742, in Rem, and is to be copied in the record.

Plaintiffs' Exhibit No. 27 is contract between the United States of America and the City of El Paso and El Paso County Water Improvement District No. 1, February 18, 1941, and is to be copied in the record.

Plaintiffs' Exhibit No. 28 is certified copy of letter of authority of February 18, 1941, which has no bearing on the points of appeal, and is to be omitted from the record.

Plaintiffs' Exhibit No. 28 a is a telegram of February 18, 1941 to W. F. Resch, which has no bearing on the points of appeal, and is to be omitted from the record.

Plaintiffs' Exhibit No. 29 is the contract between the United States of America, the City of El Paso, El Paso County Water Improvement District No. 1, and Elephant Butte Irrigation District, dated December 1, 1944, and is to be copied in the record.

Plaintiffs' Exhibit No. 30 is certified copy of letter of authority, November 22, 1944, which has no bearing on the points of appeal, and is to be omitted from the record.

Plaintiffs' Exhibit No. 31 is certified copy of the Application of the City of El Paso, No. 1584, to Board of Water Engineers of Texas, dated September 23, 1948, together with various exhibits attached thereto, to and including the order of the Board of Water Engineers dated May 10, 1950, all of which is to be copied in the record as Plaintiffs' Exhibit No. 31.

Plaintiffs' Exhibit No. 32 is the contract of August 10, 1949, between the City of El Paso, and El Paso County Water Improvement District No. 1, and is to be copied in the record, with all attachments.

Plaintiffs' Exhibit No. 33 is the stipulation of December 1, 1949, between City of El Paso, El Paso County Water Improvement District No. 1, United States of America, and Department of the Interior, Rio Grande Project, Hudspeth County Conservation & Reclamation District No. 1, Fort Quitman Land

Company, and others, with all of its exhibits, all of which is to be copied in the record as Plaintiffs' Exhibit No. 33.

Plaintiffs' Exhibit No. 34 is contract of June 22, 1950, between City of El Paso and El Paso County Water Improvement District No. 1, together with Resolution of the City Council and Resolution of El Paso County Water Improvement District No. 1, all of which are to be copied in the record as Plaintiffs' Exhibit No. 34.

Plaintiffs' Exhibits Nos. 34-a, 34-b and 34-c are data on city well pumpage attached to Fred Hervey's deposition, and have no bearing on points of appeal, so all three Exhibits Nos. 34-a, 34-b and 34-c are to be omitted from the record.

Plaintiffs' Exhibit No. 35 is a map showing the boundaries of El Paso County Water Improvement District No. 1, and is to be a part of the record on appeal, copies thereof to be incorporated in the reporter's transcript if feasible, otherwise the original of Plaintiffs' Exhibit No 35 may be transmitted to the appellate Court by order of the trial Court.

Plaintiffs' Exhibit No. 35-a consists of two contracts between the United States and the Hudspeth County Conservation & Reclamation District No. 1, one of such contracts being dated the 1st day of December, 1924, and the other being dated the 27th day of April, 1951, both of which are to be copied in the record as Plaintiffs' Exhibit No. 35-a.

Plaintiffs' Exhibit No. 36 is a graph of the discharge of the Rio Grande at El Paso for the years 1889 to 1951, and is to be photostated, or other duplicate copies secured and made a part of the record.

Plaintiffs' Exhibit No. 37 is a graph of the discharge of the Rio Grande at San Marcial for the years 1895 to 1951, and is to be photostated, or other copies secured, and thereby placed in the record.

Plaintiffs' Exhibits Nos. 38 to 87, both inclusive, are photographs of the Rio Grande and Rio Grande Reclamation Project facilities, and are not adapted to being copied into the record, and the originals thereof may, under order of the trial Court, be transmitted to the Court of Appeals for inspection by that Court.

Plaintiffs' Exhibit No. 87-a is a table showing land subject to repayment of construction charges as reflected by notices from the Secretary of the Interior. This exhibit is to be photostated or other copies thereof secured and thereby incorporated in the record.

Plaintiffs' Exhibit No. 87-b is a table showing Rio Grande Project acreage irrigated from the year 1915 to 1953, both inclusive, and is to be photostated or other copies secured and thereby incorporated in the record.

Plaintiffs' Exhibit No. 87-c is a table showing crop values of Rio Grande Project acreage from the year 1950 to 1953, which has no bearing on points of appeal, and is to be omitted from the record.

Plaintiffs' Exhibit No. 88 is a letter from Resch to Hugg, dated September 12, 1952, and is to be copied in the record.

Plaintiffs' Exhibit No. 89 is a letter from Resch to Hugg, dated September 12, 1952, and is to be copied in the record.

Plaintiffs' Exhibit No. 90 is letter from Hugg to Resch, dated September 16, 1952, and is to be copied in the record.

Plaintiffs' Exhibit No. 91 is letter from Phillips to Hugg, dated September 16, 1952, and is to be copied in the record.

Plaintiffs' Exhibit No. 92 is letter from Resch to Hugg, dated September 23, 1952, and is to be copied in the record.

Plaintiffs' Exhibits Nos. 93 to 99, both inclusive, were not admitted in evidence, but no point is made as to this ruling of the Court, and they will be omitted from the record.

Plaintiffs' Exhibit No. 99-a was not admitted in evidence, but no point is made on this ruling of the Court, and this exhibit will be omitted from the record.

Plaintiffs' Exhibit No. 100 is a letter from Tillman to Resch, dated September 29, 1952, and will be copied in the record.

Plaintiffs' Exhibits Nos. 101 to 106, both inclusive, were not admitted in evidence, and no point as to the ruling of the Court on these exhibits is made, and they will be omitted from the record.

Plaintiffs' Exhibit No. 106-a is a map showing the river and Project from Anthony to El Paso. It will be photostated or copies secured and placed in the record.

Plaintiffs' Exhibit No. 107 consists of extracts from a brochure published by the City of El Paso, the portions thereof offered in evidence being marked on pages 9 to 12 and on page 28. On page 28 what was offered in evidence was a photograph with the caption below it. The photograph cannot be copied, but the caption below the photograph on page 28 of the brochure will be copied in the record as part of Plaintiffs' Exhibit No. 107.

Plaintiffs' Exhibit No. 107-a is a map showing the location of city wells and reservoirs. It will be photostated and included in the record.

Plaintiffs' Exhibits Nos. 108, 108-a and 108-b are certified copies of deeds which were not admitted in evidence. No point is made as to the ruling of the Court, and these three exhibits will be omitted from the record.

Plaintiffs' Exhibit No. 109 is a copy of 49 Statutes at Large, page 24, Act of February 13, 1935, Chapter 7, being Joint Resolution with reference to canalization of the Rio Grande, and will be copied in the record.

Plaintiffs' Exhibit No. 110 is composed of several maps of the canalization of the Rio Grande from the New Mexico-Texas line to the American Dam. These maps will be photostated and placed in the record as Plaintiffs' Exhibit No. 110.

Plaintiffs' Exhibit No. 110-a is a copy of 36 Statutes, 557 at 559, being the seventh paragraph of the New Mexico Enabling Act, and will be copied in the record.

Plaintiffs' Exhibit No. 111 is a list of deeds and condemnation suits under which the United States acquired title for canalization of the Rio Grande in Texas, and will be photostated, and thereby placed in the record.

Plaintiffs' Exhibit No. 112 consists of maps of the River Rectification Project from El Paso to Fort Quitman, and will be photostated and placed in the record.

Plaintiffs' Exhibit No. 113 is a map of the Chamizal Zone in the City of El Paso. It is not relevant to points of appeal and will be omitted from the record.

Plaintiffs' Exhibit No. 114 is an aerial photograph of the Chamizal Zone in the City of El Paso, showing the west end of the Rectification Project, but is not pertinent to points of appeal and will be omitted from the record.

Plaintiffs' Exhibits Nos. 115 to 148, both inclusive, consist of correspondence and a power of attorney, all having been offered by the plaintiffs to show the

City's recognition of the contracts of 1941 and 1944, and will be copied in the record.

Plaintiffs' Exhibit Nos. 148-a, 148-b, 148-c, 149-d, 148-e and 148-f are bills to the City of El Paso showing charges by El Paso County Water Improvement District No. 1 to the City of El Paso, and all will be copied in the record.

Plaintiffs' Exhibit No. 149 is a set of graphs showing water pumped by the City from wells during the period 1944 to 1953, both inclusive, but is not pertinent to points of appeal and will be omitted from the record.

Plaintiffs' Exhibit No. 150 is a set of graphs showing the flow of the Rio Grande at San Marcial, and at El Paso, for the years 1897 to 1914. It is not susceptible to be copied, and may be sent up as an original for consideration by the Court of Appeals by order of the trial Court.

Plaintiffs' Exhibit No. 151 is a graph showing annual discharge of the Rio Grande at San Marcial and periods of low flow in the Rio Grande above El Paso for the years 1897 to 1953. It will be photostated and thus included in the record.

Plaintiffs' Exhibit No. 151-a is a contract between the United States of America and the El Paso Electric Company, dated the 26th day of May, 1932. It will be copied in the record.

Plaintiffs' Exhibit No. 152 is a series of graphs showing daily hydrographs of Rio Grande at El Paso

for the years 1938 to 1953, both inclusive. It is not adapted to being copied, and may be transmitted to the Court of Appeals for consideration by that Court as an original exhibit by order of the trial Court.

Plaintiffs' Ex. No. 153 is a schematic map not adapted to being copied and may be sent to appellate Court as an original under order of the trial Court.

Plaintiffs' Ex. No. 154 consists of hydrographs of Daily Flow in Main Canals 1945-1954, not suitable for being copied and may be sent to appellate Court as an original under order of trial Court.

Defendant's Ex. No. 1 is the City Ordinance of Sept. 16, 1889, granting a right-of-way to El Paso Irrigation Company. It will be copied in the record.

Defendant's Ex. No. 2 is City Ordinance of Dec. 11, 1913, amending an ordinance of Sept. 16, 1889, and will be copied in the record.

Defendant's Ex. Nos. 3 to 18, both inclusive, consist of graphs which are not suitable for being copied, and may be transmitted to the Court of Appeals for consideration by that Court as original exhibits under order of the trial Court.

Defendant's Ex. No. 19 consists of figures an amount of water through meter at water treatment plant, and will be copied into the record.

Defendant's Ex. No. 20 is a table of figures on effluent discharged from sewage plant from 1944 to 1954, both inclusive, and will be copied in the record.

Defendant's Exhibits Nos. 21, 22, 23, 24, 25, 26, 27, and 28 consist of photographs which are not suitable to be copied, and may be transmitted to the Court of Appeals as original exhibits by order of the trial Court.

Defendant's Exhibit No. 29 is a tabulation of water metered from the river and amounts pumped from the canal for the years 1950 to 1954, and a percentage of the amount of water pumped from the river into the treatment plant. This exhibit will be copied in the record.

Defendant's Exhibit No. 30 is a drawing indicating relative positions of various physical objects from American Dam to Santa Fe Street Bridge, and will be photostated and placed in the record.

Defendant's Exhibit No. 31 is a photograph of the bed of the Rio Grande opposite the water treatment plant, and is not capable or suitable to be copied and may be transmitted to the Court of Appeals as an original exhibit by order of the trial Court.

Defendant's Exhibit No. 32 is a table of percentages of water produced by the City from wells and from treatment plant for the years 1946 to 1953. This will be copied in the record.

Defendant's Exhibit No. 33 consists of data on population, and will be copied in the record.

Defendant's Exhibit No. 34 is a letter from the Secretary of the Board of Water Engineers of Texas to Harlan Hugg, dated March 25, 1953, reference ex-

tension of time to City to commence work. This will be copied in the record.

Defendant's Exhibit No. 35 is a photostat of an order of the Board of Water Engineers, dated May 5, 1952, extending the City's time for one year from May 10, 1952, to begin construction. It will be copied in the record.

Defendant's Exhibit No. 36 is a map of Campbell's Addition to the City of El Paso as in the year 1296. It is not suitable to be copied and may be transmitted as an original exhibit to the Court of Appeals by order of the trial Court.

Defendant's Exhibit No. 37 is a map of a portion of the metropolitan area of the City of El Paso showing city limits as of August 6, 1954. It is not suitable to be copied, and may be sent to the Court of Appeals for consideration as an original exhibit by order of the trial Court.

Defendant's Exhibits Nos. 38 to 48, both inclusive, are photographs which are not suitable for copying, and may be transmitted to the Court of Appeals as original exhibits by order of the trial Court.

Defendant's Exhibit No. 49 is a plat of El Paso by Anson Mills in the year 1859. It will be photostated and thus incorporated into the record.

Defendant's Exhibit No. 50 in a City Ordinance of May 1, 1874, regulating streets and alleys. It will be copied in the record.

Defendant's Exhibit No. 51 is a copy of Texas law incorporating the City of El Paso in 1873. It will be copied in the record.

Defendant's Exhibit No. 52 is an Act of the Texas Legislature of 1874 to encourage irrigation. It will be copied in the record.

Defendant's Exhibit No. 53 is a city ordinance of August 25, 1873, for temporary management of acequias. It will be copied in the record.

Defendant's Exhibit No. 54 is City Ordinance of August 25, 1873, for government of acequias. It will be copied in the record.

Defendant's Exhibit No. 55 is a Resolution of the City Council of November 14, 1874, relative to repairs on acequias. It will be copied in the record.

Defendant's Exhibit No. 56 is City Ordinance of March 5, 1875, giving right-of-way to El Paso Irrigation Company through the City. It will be copied in the record.

Defendant's Exhibit No. 57 is City Ordinance relating to grist mill of Joseph Magoffin on Acequia, August 28, 1875. It will be copied in the record.

Defendant's Exhibit No. 58 is City Ordinance of August 10, 1875, concerning no change in regulations of water and labor until after corn crop of that year It will be copied in the record.

Defendant's Exhibit No. 59 is an ordinance of September 11, 1875, relative to construction of aqueduct over tail race leaving Hart's Mill. It will be copied in the record.

Defendant's Exhibit No. 60 is an ordinance of August 3, 1880, against bathing in acequia, Book B., page 13. It will be copied in the record.

Defendant's Exhibit No. 61 is an ordinance of August 21, 1880, Book B, page 24, reference to control over acequias within city limits. It will be copied in the record.

Defendant's Exhibit No. 62 is copy of petition of Charles R. Morehead and others, reference to franchise for El Paso Water Company, Book B, Page 97, April 14, 1881. It will be copied in the record.

Defendant's Exhibit No. 63 is an ordinance of May 7, 1881, Book B, page 115, giving franchise to El Paso Water Company. It will be copied in the record.

Defendant's Exhibit No. 64 is Act of March 2, 1889, Texas Legislature, granting a new charter to the City of El Paso. It will be copied in the record.

Defendant's Exhibit No. 65, Act of March 19, 1889, Texas Legislature, with reference to irrigation. It will be copied in the record.

Defendant's Exhibit No. 66, Resolution of City Council, October 25, 1889, reference to agreement between City and El Paso Water Company, Book F, page 68. It will be copied in the record.

Defendant's Exhibit No. 67 is ordinance of June 28, 1890, re use of acequia and prices of water, Book F, page 238. It will be copied in the record.

Defendant's Exhibit No. 68, ordinance of February 7, 1890, Book F, page 140, granting additional franchise to El Paso Irrigation Company. It will be copied in the record.

Defendant's Exhibit No. 69 is an ordinance of May 16, 1890, Book F, page 220, approving bond of El Paso Irrigation Company. It will be copied in the record.

Defendant's Exhibit No. 70 is a document in Spanish relating to the town of Socorro. It is not relevant to points of appeal, and will be omitted from the record.

Defendant's Exhibit No. 71 is a photostat of an Act of El Paso County Commissioners' Court for the government, control and management of the acequias in Precinct No. 1, June 13, 1888. It will be copied in the record.

Defendant's Exhibit No. 72, document in Spanish dated 1879, relating to regulation of water in town of Ysleta. Not relevant to points of appeal, and will be omitted from the record.

Defendant's Exhibit No. 73, photostat of Ordinance No. 10, an ordinance to regulate working of the community water ditches, December 6, 1893. It will be copied in the record.

Defendant's Exhibit No. 74, certified copy of ordinance for town of Socorro, approved February 14, 1887, by County Judge of El Paso County. It will be copied in the record.

Defendant's Exhibit No. 75, water consumption tax receipt No. 26, for year March 1, 1887, to March 1, 1888, issued to County Clerk. It will be copied in the record.

Defendant's Exhibit No. 76, entire Charter of City of El Paso. It will not be copied into the record but may be sent up as an original exhibit under order of Court.

Defendant's Exhibit No. 77 consists of figures on water taken from Franklin Canal intake station at water plant, reference to arroyo and drain return and Canutillo well water, 1950 to 1951, to 1953 to 1954. This will be copied in the record.

Defendant's Exhibit No. 78, figures on discharge of riverside canal at riverside heading by months from January, 1939, to December, 1954. It will be copied in the record.

Defendant's Exhibit No. 79 consists of figures on El Paso sewage outfall in acre feet by months from January, 1939, to December, 1954. This will be copied in the record.

Defendant's Exhibit No. 80 consists of annual figures showing pattern of operation of river in acre feet for year 1939 to 1954. It will be copied into the record.

Defendant's Exhibits Nos. 81 to 85, both inclusive, consist of photographs which are not suitable for being copied into the record, and may be transmitted to the appellate Court as original exhibits under order of the trial Court.

V.

Opinion of the Court.

VI.

Original judgment of the Court filed August 2, 1955.

VII.

Defendant's Motion to correct judgment filed August 12, 1955.

VIII.

Motion by Plaintiffs to Alter or Amend Judgment (Filed August 12, 1955).

IX.

Amended and Corrected Judgment dated and entered September 28, 1955.

X.

Notice of appeal by Plaintiffs from parts of judgment.

XI.

Notice of Cross-Appeal by Defendant from parts of judgment.

XII.

Appeal Cost Bond.

XIII.

Statement of Points on which Appellants Intend to Rely upon Appeal.

XIV.

Statement of Points on which Defendant City of El Paso Intends to Rely upon Cross-Appeal.

XV.

Order of Trial Judge as to certain exhibits to be transmitted as originals to appellate Court.

XVI.

This Agreement as to Transcript of Record.

EL PASO COUNT WATER IMPROVEMENT DISTRICT NO. 1, L. D. McCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BRIGGS, and W. S. SUMMERS.

Plaintiffs-Appellants.

By (S.) EUGENE T. EDWARDS,
(Eugene T. Edwards),
Attorney of Record
UNITED STATES OF
AMERICA,
Plaintiff-Appellant,
By(S.) HOLVEY WILLIAMS,
Holvey Williams),
Attorney of Record
CITY OF EL PASO,
Defendant-Appellee,
By (S.) HAROLD L. SIMS,
Attorney of Record.

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL.

(Filed December 16, 1955.)

On motion of all parties herein to extend the time for filing the record on appeal and docketing the action in this case, and such motion having been found to show good cause for such extension and it appearing to the Court that the record on appeal and the docketing of the cause in the appellate Court cannot be done with the ordinarily required time for the reason that the Court reporter, though promptly requested so to do by all parties, cannot complete the transcript of the evidence within such time on account of its unusually large size, by reason of which the Clerk will be unable to complete the record on appeal within such time, and the Court being of the opinion that such motion should be granted,

It is, therefore, so ordered, and all parties are granted an extension of time to and including Febru-

ary 23, 1956 in which to have prepared and filed and docketed such record on appeal, this being ninety days from November 25, 1955, the date of first notice of appeal herein, and the Clerk is ordered to file such motion and this order and to enter this order of record.

Dated this 16th day of December, 1955.

S.) JOS. B. DOOLEY,
United States District Judge.

Approved and Agreed to:

LOUIS A. SCOTT,
1100 First National Bldg.,
El Paso, Texas,
and
EUGENE T. EDWARDS,
Attorneys for all Plaintiffs except the United States of America.
11th Floor, Bassett Tower,
El Paso, Texas.

By (S.) EUGENE T. EDWARDS.
RUSSELL B. WINE,
United States Attorney.
By S.) HOLVEY WILLIAMS,
(Holvey Williams),
Assistant United States Attorney, United States Court House, El Paso, Texas,
For the United States of America

(S.) ALLEN R. GRAMBLING,
Attorney for Defendant, City of El Paso.

CLERK'S CERTIFICATE.

I, MAXEY HART, Clerk of the United States District Court in and for the Western District of Texas, do hereby certify that the foregoing on 2054 pages, in 4 Volumes, is a true and correct transcript of proceedings had and orders entered, as therein states, in Civil Action No. 1409, styled: El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs, W. S. Summers, together with The United States of America versus City of El Paso, as the same appear on file and of record in this office.

I further certify that said transcript of record includes only such pleadings, and orders as are specified in the Agreement as to Transcript of Record filed herein.

Witness my official signature and the seal of said District Court at the City of El Paso, Texas, this the 10th day of February, 1956.

MAXEY HART,
Clerk,
By PAULINE G. SILVEUS,
(Pauline G. Silveus)
Deputy

(Seal)

LIBRARY
SUPREME COURT, U.S.

No. 178
~~1096~~

Office - Supreme Court, U.S.
FILED
JUN 17 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

CITY OF EL PASO,

Petitioner,

—vs—

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, L. D. McCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BRIGGS, and W. L. SUMMERS, together with THE UNITED STATES OF AMERICA,

Respondents.

Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

ALLEN R. GRAMBLING
HAROLD L. SIMS
El Paso Natural Gas Co. Building
El Paso, Texas

TRAVIS WHITE
H. E. BROCKMOLLER
El Paso National Bank Building
El Paso, Texas

Attorneys for Petitioner

INDEX

	Page
Opening Statement	1
Jurisdiction	2
Opinions Below	2-3
The Questions Presented	3-5
Statutes Involved	5
Statement	5-10
Specification of Error	11-13
Reasons for Granting Writ of Certiorari	13-14
Argument Under First Question	14-20
Argument Under Second Question	20-23
Argument Under Third and Fourth Questions	23-27
Argument Under Fifth Questions	28-31
Argument Under Sixth Question	31-32
Conclusion	33
Certificate of Service	34
Appendix	35

INDEX OF AUTHORITIES

Page

Chicago, R.I. & Gulf Railway Co. vs. Tarrant County Water Control & Improvement District No. 1
73 S.W. 2d. 55 ..... 23, 25

City of Beaumont v. Gulf States Utilities Co.
163 S.W. 2d. 426 27

City of Bryan v. Page
51 Tex. 532 13

City of Denver v. Denver City Cable Car Railway Co.
45 P. 434 ..... 12, 25

City of Paris v. Sturgeon
110 S.W. 459 13

City of Teague v. Sheffield
26 S.W. 2d. 417 13

Commonwealth v. Inhabitants of Deerfield
6 Allen (Mass.) 456 ..... 23, 27

Dalhart v. Childers
18 F. Supp. 903 13

Davis Holding Company v. Wilcox
153 A. 169 ..... 12, 24

Delaware River Joint Toll Bridge Comm. v. Colburn
310 U.S. 419, 60 S. Ct. 1039, 84 L. Ed. 1283 20

INDEX OF AUTHORITIES (Continued)

	Page
Ennis Waterworks v. City of Ennis 144 S.W. 930	27, 29
Foster v. Waco 225 S.W. 1104	13
Hinderlider v. La Plata River & Cherry Creek Ditch Co. 304 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202	14, 19, 20, 31
Hudspeth County Conservation & Reclamation District No. 1 v. Robbins 213 F. 2d. 425	13, 16, 18
Humphries-Mexia Company v. Arseneaux 297 S.W. 225	11, 20, 21, 31
Ickes v. Fox 57 S. Ct. 412, 300 U.S. 82	13, 15, 31
Kansas v. Colorado 51 L. Ed. 956	16
Louisiana v. Texas 20 S. Ct. 251, 176 U.S. 17, 44 L. Ed. 347	13-14, 19, 31
Nebraska v. Wyoming 325 U.S. 589, 65 S. Ct. 1332; 295 U.S. 40, 55 S. Ct. 568	13, 15, 31
Nolte Irrigation Co. v. Willis 180 S.W. 2d. 451	21, 31

INDEX OF AUTHORITIES (Continued)

Peoples v. Smith Bros.
65 S.W. 2d. 777 ..... 27, 28

Phillips v. City of Abilene
195 S.W. 2d. 147 30

Rhodes v. Mummery
48 Ind. 216 ..... 12, 25

Smith v. Grayson County
44 S.W. 921 ..... 23, 26

State ex rel. Dyer v. Sims
71 S. Ct. 507, 341 U.S. 22, 95 L. Ed. 713 19

State v. Emerson
10 A. 2d. 515 ..... 23, 26

Tennessee Electric Co v. White County
52 F. 2d. 1065 ..... 12, 23, 26

Texas Company v. Burkett
296 S.W. 273 ..... 11, 20, 21, 31

Texas Company v. Texarkana Machine Shops
1 S.W. 2d. 928 ..... 27, 28

United States v. Union Gap Irrigation Co.
209 F. 274 ..... 21, 31

Art. 1, Sec. 17 Revised Statutes of Texas 28

Art. 7466e-1 Revised Statutes of Texas 5, 14, 18

Title 43 U.S.C.A., Sec. 383 ..... 5, 13, 14, 16, 18

41 Stat. 451 5

Sec. 8, 32 Stat. 390 11

No.

IN THE

Supreme Court of the United States

October Term, 1956

CITY OF EL PASO,

Petitioner,

—vs—

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, L. D. McCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BRIGGS, and W. L. SUMMERS, together with THE UNITED STATES OF AMERICA,

Respondents.

Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, the City of El Paso, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on April 2, 1957, which reversed the favorable parts of a judgment for Petitioner entered by the United States District Court for the Western District of Texas, and affirmed those parts in favor of Respondents.

JURISDICTION

The United States Court of Appeals in its Opinion, decided questions contrary to former decisions of the Supreme Court of the United States.

The Court of Appeals Opinion in this case decided questions contrary to Section 8 of the United States Reclamation Act (Title 43 U.S.C.A. Section 383).

The Court of Appeals decided an important state question in a way that is in conflict with the applicable state law.

The Court of Appeals in its Opinion decided a Federal question in this case in a way that is in conflict with applicable decisions of this Court.

This Court further has jurisdiction under the Act of June 25, 1948, Chapter 646 (62 Stat. 933, U.S. Code, Title 28, Section 1345) in that it is a civil action suit or proceeding where the United States is Plaintiff.

The Court of Appeals has decided an important Federal question which has not been settled by this Court, to-wit, the effect of the Rio Grande Compact.

The Court of Appeals in its Opinion has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

OPINIONS BELOW

The Opinion of the District Court is reported in 133 F. Supp. 894, and is also printed in the Record (R. 1752-1765).

The case was submitted to the United States Court of Appeals for the Fifth Circuit on January 30, 1957 before Honorable Joseph Hutcheson, Ben F. Cameron and Warren L. Jones, Circuit Judges. On April 2, 1957 the Honorable United States Court of Appeals for the Fifth Circuit entered judgment granting all points urged on appeal by Respondents, and refusing all points urged on appeal by the Petitioner. Petitioner therefore presents its Petition for Writ of Certiorari to this Honorable Court as authorized by judicial code, Section 240 as amended (*Title 28, Section 347, U.S.C.A. and Title 28, Section 1254 U.S.C.A.* as amended).

THE QUESTIONS PRESENTED

There are a number of questions of error in this suit as set out in Petitioner's Petition for Rehearing (R. 1829 to 1834). However, Petitioner feels that the questions herein stated are controlling in this case, and raise the most important issues involved:

No. 1: The first question presented is whether the effect of the Rio Grande Compact between the States of Texas, New Mexico and Colorado, commonly referred to as the Rio Grande Compact, set out in *Article 7466e-1* of the Revised Statutes of Texas (approved by the Congress of the United States May 31, 1931) is to divide the waters of the Rio Grande equitably among the three states, or, as held by the Court of Appeals without citation of authority or reference to the Record, that certain waters above Fort Quitman, Texas were committed to the primary service of the Bureau of Reclamation's Rio Grande Project.

No. 2: The question of whether the Court of Appeals erred in holding that the City of El Paso could not take pay-free from the bed of the Rio Grande, located in the City of El Paso, a quantity of water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande, and which does not decrease the amount of water available to any downstream users in any amount.

No. 3: The question of whether or not the Court of Appeals erred in holding that Respondent District is not legally liable in this case to Petitioner City for the sum of $44,427.59 as the cost of replacing the bridges across the Franklin Canal at Piedras Street and Verde Street in the City of El Paso with bridges reasonably necessary to adequately care for the common traffic across such bridges, where the District had refused to replace such bridges as they were obligated to do, and where no money was appropriated by Congress therefor.

No. 4: The question of whether or not the Court of Appeals erred in holding that Respondent District is not legally liable where it is reasonably necessary at any crossings described in the quit-claim deed from the City of El Paso to the United States of America, dated November 9, 1939, to replace bridges at such crossings reasonably required to maintain adequate structures for the common traffic across the Canal at such crossings when no money is appropriated by Congress therefor, or whether the Court of Appeals was correct in giving a "strait-jacket" definition to the word "maintain," contrary to the holding of the Trial Court.

No. 5: The question of whether the Court of Appeals erred in holding that the Petitioner's Ordinance dated November 9, 1939 is valid and binding on the City, and

in holding that the quit-claim deed dated November 9, 1939 from the City of El Paso to the United States of America is valid, and therefore Respondents were not required to obtain a franchise for the Franklin Canal across the streets of the City of El Paso, or whether the Respondents could not lawfully occupy the streets of the City of El Paso without a franchise.

No. 6: The question of whether or not the Court of Appeals erred in enjoining the City of El Paso, its Mayor, Engineers, and members of its Public Service Board, Superintendent of Water Works, and its agents and representatives, and the successors of each and all of them, from taking water from the river bed of the Rio Grande or from the Franklin Canal, except in the manner and in accordance with th ights of said City of El Paso as fixed and determined by the Contract of August 10, 1949 (R. 485), or whether the Contract is without consideration, and lacks mutuality as held by the Trial Court.

STATUTES INVOLVED

Article 7466e-1 Revised Statutes of Texas (Rio Grande Compact); Title 43 U.S.C.A., Section 383, and 41 Stat. 451 (Section 8, Reclamation Act).

STATEMENT

This suit was originally brought by Respondent, El Paso County Water Improvement District No. 1, and various individual farmers, against Petitioner, City of El Paso, United States of America, and Hudspeth County Conservation and Reclamation District No. 1. Subsequently, the Hudspeth County Conservation and Reclamation District No. 1 was dismissed as a party Defendant, and the United States of America became a party Plaintiff.

This suit was brought by Respondents for the following relief:

(1) To prohibit the City of El Paso (hereinafter referred to as "City") from using any waters of the Rio Grande for domestic and municipal purposes without payment to the District of charges, the water to be taken only under the conditions and limitations as set forth in alleged contracts which the City claims to be void for various reasons, such as being ultra vires the City, against public policy, without considerations deemed valuable in law, and without authority on the part of those attempting to bind the parties to said contract.

(2) To determine the right of the City to compel the District to maintain adequate bridges across the Franklin Canal after Congress has failed to appropriate money therefor, wherein said Canal lies in and across various public streets and alleys of the City.

(3) To determine the validity of the claim of the District to use the public streets and alleys of the City without a franchise for an irrigation canal.

(4) To determine the claim of the District to prohibit the City from using the bed and banks of the Rio Grande for the carriage of well water delivered into the Rio Grande by the City and diverted by it at its water treatment plant on the American bank of the Rio Grande, and to determine the claim of the right of the District to charge for the use of said river as a carrier.

(5) To determine the validity of the claim of the District to prohibit the City from taking from the Rio Grande an amount of Project water equal to the effluent

which the City discharges into the river, the taking and discharge being within the city limits of the City, and not within the geographic boundary of the El Paso County Water Improvement District No. 1.

(6) To determine the validity of the claim of the District to limit the use of and the amount of water which the City may take from the Rio Grande under a permit from the Board of Water Engineers from the State of Texas for 27,000 acre feet per annum.

(7) For money claimed to be due and owing by the City to the District for the carriage of water. (R. 13-50).

The City of El Paso contends that:

(1) The City has title to one-half of the beds and channels and of the abandoned beds and channels of the Rio Grande within the present and future corporate limits of the City, and that lands are located in the City which has riparian rights as to privately owned lands lying within the City, and not within the geographic limits of the El Paso County Water Improvement District No. 1, and that the owners of such lands and the City have the right to obtain water from the Rio Grande for domestic and municipal use prior and superior to any claim of the District.

(2) The District illegally maintains and operates an irrigation canal called the Franklin Canal, which it has so maintained and operated since July 6, 1939, located in part in some of the public streets and alleys of the City of El Paso without having secured a franchise from the City as required by its charter, and the laws of the State of Texas.

(3) The District illegally claims complete control and ownership of the Rio Grande, including riparian and storm and flood waters thereof, as the District has no permit or permits from the Board of Water Engineers of the State of Texas for said waters excepting a very minor amount, and has no other valid claim to such water.

(4) The District collects and stores water of the Rio Grande belonging to the City without right of State or Federal Law, thereby depriving the City of water which it is legally entitled to use.

(5) The City is entitled to take pay-free from the bed of the Rio Grande located in the City of El Paso, a quantity of Project water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande.

(6) The City is entitled to recover the sum of $51,397.69 for bridges which it was required to build over the canal wherein the same lies in the public streets and alleys of the City of El Paso, and to recover the additional sum of $12,872.22, which sum was illegally collected by the District from the City of El Paso for the transportation of water.

(7) The City is entitled to an injunction against the Respondents restraining them from interfering with the City's use of waters of the Rio Grande, to which it is legally entitled (R. 51-76).

This case was tried by the Honorable Joseph B. Dooley, without a jury, and decree was entered on August 1, 1955 (R. 1731-1744) and as amended September 28, 1955 (R. 1752-1764). The Honorable Trial Court held that the City was entitled to take pay-free from the bed of the

Rio Grande located in the City of El Paso, a quantity of Project water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande (R. 1735-1737).

The Trial Court further held that the City was entitled to judgment against the District for $44,053.95 incurred by the City in placing reasonably adequate bridges over the Franklin Canal at Piedras Street and Verde Street respectively in the City of El Paso, and the District was obligated to maintain adequate structures for the common traffic across the Franklin Canal at street crossings, where no money is appropriated by Congress therefor. The Trial Judge ruled against the City on its other contentions herein, and held for the District on those contentions (R. 1731-1765). The opinion of the Trial Court in which he deals with the various questions involved is found in the Record (R. 1658-1731). The District appealed to the United States Court of Appeals for the Fifth Circuit, as to all points decided adversely to it, and the City filed a cross appeal as to all points decided adversely to the City.

On April 2, 1957, the United States Court of Appeals for the Fifth Circuit entered its judgment in this case, holding in favor of the District on all points urged by it on appeal, and holding against the City on all points urged by it on cross appeal (R. 1828). The City filed its Petition for rehearing in this case with the United States Court of Appeals for the Fifth Circuit on April 15, 1957, and set out twelve points of error (R. 1829 to 1834). This Petition was in all things overruled by the Court of Appeals on May 24, 1957 (R. 1835 to 1836). Circuit Judge Cameron dissented and held that the Decision of the Trial Court should be affirmed *in toto*. (R. 1835-a).

The City most strongly urges in this case that the Court of Appeals erroneously held that the City of El Paso could not take pay-free from the bed of the Rio Grande located in the City of El Paso a quantity of Project water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande.

The City also strongly urges that the Court of Appeals erred in holding that the District is not legally liable to the City of El Paso for the sum of $44,427.59 as a cost of replacing bridges across the Franklin Canal at Piedras Street and Verde Street in the City of El Paso with bridges reasonably necessary to adequately care for the common traffic across such bridges.

Also, the Court of Appeals erred in holding that it was unnecessary to decide that the waters of the Rio Grande were committed to the primary service of the Rio Grande Project prior to the effective date of the Rio Grande Compact between Colorado, New Mexico and Texas.

It appears from Respondent District's Complaint that it is a legal and valid conservation and reclamation district organized under the laws of Texas, with its principal office in El Paso County, Texas. It also appears that the United States of America is a party Plaintiff (R. 14). It also appears that the amount in controversy, exclusive of interest and costs, exceeds $3,000.00 (R. 37).

This Court has jurisdiction under the Act of June 25, 1948 (62 Stat. 930, U. S. Code, Title 28, Section 1331) in that this is a civil action wherein the matter in controversy exceeds $3,000.00 exclusive of interest and costs, and arises under the Constitution, letters or treaties of the United States as hereinafter more fully shown in detail.

SPECIFICATION OF ERROR

The Court of Appeals erred as follows:

(1) On the First Question—

(a) In holding that the United States was authorized to take all of the waters of the Rio Grande and commit the same to the Rio Grande Project of the Bureau of Reclamation without authority of State or Federal Law.

(b) In holding that the Rio Grande Compact did not apportion the waters of the Rio Grande equitably among the contracting states.

(c) In holding that Section 8 of the Reclamation Act (Section 8, 32 Stat. 390) did not require the Secretary of the Interior to proceed in conformity with State Law in appropriating waters of the Rio Grande.

(2) On the Second Question—

In holding that the City of El Paso could not take pay-free from the bed of the Rio Grande located in the City of El Paso a quantity of water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande, and which does not decrease the amount of water available to any downstream users in any amount. (*Texas Company v. Burkett*, 296 S.W. 273, 276, *Supreme Court of Texas; Humphries-Mexia Company v. Arseneaux*, 297 S.W. 225, 229, *Supreme Court of Texas*).

(3) On the Third and Fourth Questions—

(a) In holding that Respondent District is not legally liable in this case to Petitioner City for the sum of $44,427.59 as the cost of replacing the bridges across

the Franklin Canal at Piedras Street and Verde Street in the City of El Paso with bridges reasonably necessary to adequately care for the common traffic across such bridges, where the District had refused to replace such bridges as they were obligated to do, and where no money was appropriated by Congress therefor.

(b) In holding that the word "maintain" as used in the quit-claim deed dated November 9, 1939 from the City of El Paso to the United States of America only required the Respondent District to repair bridges constructed in 1911, and did not require that bridges be maintained at such crossings which were reasonably necessary and adequate for the common traffic across the canal at such crossings. (*Davis Holding Company v. Wilcox*, 153 A. 169, 172, Supreme Court, Connecticut; *Rhodes v. Mummery*, 48 Ind. 216; *City of Denver v. Denver City Cable Car Railway Co.*, 45 P. 434, 440; *Tennessee Electric Co. v. White County*, 52 F. 2d. 1065).

(4) On the Fifth Question

In holding that the ordinance and quit-claim deed of November 9, 1939 granted to the United States of America a perpetual right of way in the streets and alleys of the City of El Paso for the maintenance of an irrigation canal without compliance with the plain wording of the Charter of the City of El Paso. (Sections 35, 36 and 37 Plaintiff's Exhibit No. 15; R. 227-229, Appendix "A").

(5) On the Sixth Question

In enjoining the City of El Paso, its Mayor, Engineers and members of its Public Service Board, Superintendent of Water Works, and its agents and representatives, and the successors of each and all of them, from taking water

from the river bed of the Rio Grande or from the Franklin Canal except in the manner and in accordance with the rights of said City of El Paso as fixed and determined by the contract of August 10, 1949 (R. 485), which contract is without consideration and lacks mutuality. (*Dalhart v. Childers*, 18 F. Supp. 903; *Foster v. Waco*, 225 S.W. 1104; *City of Paris v. Sturgeon*, 110 S.W. 459; *City of Teague v. Sheffield*, 26 S.W. 2d. 417; *City of Bryan v. Page*, 51 Tex. 532).

REASONS FOR GRANTING WRIT OF CERTIORARI

I.

The United States Court of Appeals in its Opinion decided questions contrary to former decisions of the Supreme Court of the United States. *Nebraska v. Wyoming*, 325 U.S. 589, 65 S. Ct. 1332; *Nebraska v. Wyoming*, 295 U.S. 40, 55 S. Ct. 568; *Ickes v. Fox*, 57 S. Ct. 412, 300 U.S. 82.

The Court of Appeals Opinion in this case decided questions contrary to Sec. 8 of the United States Reclamation Act (*Title 43 U.S.C.A. Section 383*).

The Court of Appeals in its Opinion has decided a Federal question in this case in a way that is in conflict with applicable decision of such Court. *Hudspeth County Conservation and Reclamation District No. 1 v. Robbins*, 213 F. 2d. 425.

The Court of Appeals has decided an important Federal question which has not been settled by this Court, to-wit, the effect of the Rio Grande Compact. *Louisiana*

v. Texas, 20 S. Ct. 251, 176 U.S. 17, 44 L. Ed. 347; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 301 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202.

ARGUMENT UNDER FIRST QUESTION

The Honorable United States Court of Appeals for the Fifth Circuit erred in refusing to set aside that portion of the judgment of the Trial Court which held that the waters of the Rio Grande are definitely committed by prior right under the Rio Grande Compact of 1938 between Colorado, New Mexico and Texas (approved by the Congress May 31, 1931) to the service and use of the lands in the Rio Grande Reclamation Project lying in the States of New Mexico and Texas. It also erred in holding that it was unnecessary to decide that the waters of the Rio Grande were committed to the primary service of the Rio Grande Project prior to the effective date of the Rio Grande Compact between Colorado, New Mexico and Texas.

This holding is contrary to the provisions of the Rio Grande Compact entered into between the States of Colorado, New Mexico and Texas on March 18, 1938 set out in *Article 7466c-1* of the Revised Statutes of Texas. (Appendix "B"). This Compact, as will be seen further on in this Petition, only attempts to allocate water between the States, and not to individuals within a State once it has reached a State.

This holding is also contrary to the provisions of the Reclamation Act in connection with the rights of the United States. *Title 43 U.S.C.A.* Section 383 (Section 8, Reclamation Act) (Appendix "C") provides as follows:

> "Nothing in this chapter shall be construed as affecting or intending to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation or any vested right acquired thereunder."

This Act has been passed upon by the Supreme Court of the United States in several cases wherein the United States claimed as they do in the case at bar that they have either an allocation of the water, or are the owners of unappropriated waters of streams.

The Supreme Court in *Nebraska v. Wyoming*, 325 U.S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815, said that water of a stream withdrawn for a project was not an appropriation of that water by the United States. Quoting from the earlier case of *Nebraska v. Wyoming*, 295 U.S. 40, 55 S. Ct. 568, it was held:

> "The Bill alleges and we know as a matter of law that the Secretary and his agents acting by the authority of the Reclamation Act and supplementary legislation must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the law."

Under these decisions the United States did not acquire any rights in the so-called Project waters and the rights of the individual land owners and irrigation districts could only be acquired to waters by complying with the laws of the state or territory.

In *Ickes v. Fox*, 57 S. Ct. 412, 300 U.S. 82, 81 L. Ed. 525, the Supreme Court announced the same rule again and went further and said that the manner of diversion

and storage of waters by the United States did not constitute appropriation, and the laws of the State had to be complied with in respect to such appropriation. The case of *Kansas v. Colorado*, 51 L. Ed. 956 at page 973 quotes Section 8 of the Reclamation Act (43 U.S.C.A. Article 383), and after quoting this Act, the Court states:

> "But it is useless to pursue the inquiry further in this connection. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters."

The decision in the case at bar is also contrary to the decision of the United States Court of Appeals for the Fifth Circuit in *Hudspeth County Conservation and Reclamation District No. 1 v. Robbins*, 213 F. 2d. 425, in which it was stated at page 430:

> "Although the Government diverted, stored and distributed the water, the contention of Petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded."

The Court further stated at page 429:

> "Nothing in Sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this Title shall be construed as affecting or intended to affect, or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the secretary in carrying out the provisions of such sections shall proceed in conformity with such laws."

The Honorable Trial Court clearly erred in holding that the Rio Grande Compact controlled the use and distribution of the waters of the Rio Grande after the same reached the boundaries of the State of Texas, which opinion, at least by implication, was affirmed by the Court of Appeals. It is of utmost importance not only to the State of Texas, but to the people residing in the State of Texas, and also to the States of Colorado, and New Mexico, and the people residing in those states, that the Supreme Court determine the legal effect of the Rio Grande Compact. No decision has been rendered determining the effect of that Compact by the Supreme Court.

The Honorable United States Court of Appeals in its Opinion at page 4 stated it is unnecessary for it to discuss many of the matters dealt with in the briefs in this case, and it is particularly so as to Plaintiff's contention that the waters of the Rio Grande were committed to the primary service of the Rio Grande Project prior to the effective date of the Rio Grande Compact between Colorado, New Mexico and Texas.

It is Petitioner's earnest belief that this case cannot be decided simply by a statement rejecting all theories of Petitioner, and adopting all theories of Respondent. This is particularly true for the reason that such holding ignores the provisions of the Rio Grande Compact upon which the Trial Court based his Opinion with reference to the parties' rights to the water of the Rio Grande, and it is particularly true for the reason that the Opinion of the United States Court of Appeals and the Opinion of the Trial Court are contrary to the several decisions of the United States Supreme Court cited herein, which have uniformly held that the waters of a stream such as the Rio Grande were under the control of the State and the

Reclamation Act has uniformly so held. The opinion of the Court of Appeals in this case is also contrary to its holding in the case of *Hudspeth County Conservation and Reclamation District No. 1 v. Robbins*, 213 F. 2d. 425, at page 430. It is Petitioner's belief that it is of the utmost importance to all states in which irrigation rights are involved, and to the people of such states that this most important question and these most important decisions of the United States Supreme Court be not overruled, by simply a general statement of the Court of Appeals that it was not necessary to consider the matters in the briefs filed herein. This alone would, in Petitioner's opinion, constitute a sufficient grounds for the granting of the Petition for Writ of Certiorari in this case.

The Reclamation Act, *Title 43 U.S.C.A., Sec. 383* (Section 8, Reclamation Act) certainly does not support the Opinion of the Court of Appeals. It provides as follows:

> "Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." (Appendix "C")

The Rio Grande Compact (*Art. 7466c-1* of the Revised Statutes of Texas) does not support the opinion of the Court of Appeals. It provides in part as follows:

"The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of the States, and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective Commissioners." (Appendix "B")

Petitioner, The City of El Paso, complied with the State law and obtained a permit to appropriate 27,000 acre feet per annum from the Rio Grande. (Respondents' Exhibit No. 31).

Petitioner respectfully urges that the Opinion of the Court of Appeals denying the City of El Paso the right to take water from the Rio Grande when it holds a permit from the State of Texas is contrary to the Reclamation Act, the applicable Decisions of the United States Supreme Court, the Water Laws of Texas, and decisions of the Appellate Courts of that State, and is not supported by the Rio Grande Compact.

Compacts between the States were authorized by the Constitution of the United States (Art. 1, Section 10, Cl. 3). Such compacts or contracts are encouraged. (*Louisiana v. Texas*, 20 S. Ct. 251, 176 U.S. 17, 44 L. Ed. 347; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 301 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202; *State ex rel. Dyer v. Sims*, 71 S. Ct. 507, 341 U.S. 22, 95 L. Ed. 713).

The Supreme Court of the United States has the final jurisdiction over such compacts, and has the final power

to pass upon the meaning of them. (*Delaware River Joint Toll Bridge Comm. v. Colburn*, 310 U.S. 419, 60 S. Ct. 1039, 84 L. Ed. 1283; *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 301 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202). The Supreme Court of the United States has never passed upon the Rio Grande Compact. It has only been passed upon by the Court of Appeals in this case by implication, and certainly this important compact and its meaning should be settled by a decision of the Supreme Court of the United States, because the rights of the Petitioner to the waters of the Rio Grande are dependent upon the correct interpretation thereof.

II.

The United States Court of Appeals in its Opinion decided an important State question in a way that is in conflict with the applicable State law. (*Texas Co. v. Burkett*, 296 S.W. 273; *Humphreys-Mexia Co. v. Arsenaux*, 297 S.W. 225).

ARGUMENT UNDER SECOND QUESTION

The Honorable United States Court of Appeals for the Fifth Circuit, erred in holding that the City could not take pay-free from the bed of the Rio Grande located in the City of El Paso, a quantity of water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande, and which action does not decrease the amount of water available to any downstream users in any amount.

The undisputed evidence is that the effluent has been used for many years by Respondents, and that they take into consideration the amount of effluent in determining how much water is released from storage facilities (R. 890).

In the case of *Texas Co. v. Burkett*, 296 S.W. 273 Supreme Court of Texas) at page 276, the Court stated:

> "Apparently it is only a prejudicial diversion of water charges prohibited by the statutes of this state."

In the case of *Humphreys-Mexia Co. v. Arseneaux*, 297 S.W. 225 (Supreme Court of Texas), it was held at page 229:

> "Upon the principle stated it is obvious that a court of equity would not, even at the suit of a riparian owner, enjoin the diversion of riparian water, unless the complainant was injured thereby, or under circumstances that would reasonably show a hostile and adverse user of sufficient moment to set in motion the statute of limitation, or prescription."

In the case of *Nolte Irrigation Co. v. Willis*, 180 S.W. 2d. 451 (Court of Civil Appeals, writ refused), it was held at page 451:

> "Where defendant violated plaintiff's statutory right by impounding surface waters, but plaintiff failed to establish that his damage was serious or would be serious, refusing to grant permanent mandatory injunction requiring defendant to remove dams and embankments or to make and maintain adequate spillways was not an abuse of discretion."

In the case of *United States v. Union Gap Irrigation Company*, 209 F. 274, it was held at page 277:

> "The government, like an individual, can appropriate only so much water as it applies to beneficial uses, and can only restrain a diversion which operates to its own prejudice."

The authorities uniformly hold that as long as a person withdrawing water, replaces as much as he takes out, there is no damage, and no one can complain of such use or withdrawal of water.

There is no provision in the contract of August 10, 1949, upon which the Court of Appeals bases its decision against the right of the City to take out of the Rio Grande water equal to the effluent it places in the Rio Grande. The Court of Appeals places great stress on the following sentence in said contract:

> "It is further understood that if such effluent is discharged into the Rio Grande, it constitutes a part of the Project water supply."

Certainly there is nothing in such statement to prevent the City from taking out as much water as the effluent it places in the Rio Grande, and certainly every known principal of equity would, as held by the Trial Judge, give the City this right of exchange. Especially is this true when the very life of the City depends on getting water from the Rio Grande to supplement its water well supply.

The Trial Court correctly held (R. 1726):

> "These views suggest strongly that the contract lacks the consideration ingredient and is illusory in its aspect as a compromise pact, but a definite ruling is unnecessary since that question does not control the decision of the Court, and, besides, said contract is revocable by either party upon reasonable notice at any time."

Petitioner cannot understand how the contract of August 10, 1949, which is lacking in both consideration and mutuality could be controlling in this instance.

III.

The United States Court of Appeals in its Opinion decided an important State question in a way that is in conflict with the applicable State law. *Smith v. Grayson County*, 44 S.W. 921 (Texas Court of Civil Appeals, error refused); *Chicago, R. I. & Gulf Railway Co. v. Tarrant County Water Control & Improvement District No. 1*, 73 S.W. 2d. 55 (Texas Supreme Court); *Tennessee Electric Co. v. White County*, 52 F. 2d. 1065 (U. S. Court of Appeals, Sixth Circuit); *State v. Emerson* (Delaware) 10 A. 2d. 515; *Commonwealth v. Inhabitants of Deerfield*, 6 Allen (Mass.) 456.

ARGUMENT UNDER THIRD AND FOURTH QUESTIONS

The Honorable United States Court of Appeals for the Fifth Circuit erred in holding that the word "maintain" was used in the ordinance of the City of El Paso dated November 9, 1939, and the quitclaim deed from Petitioner City to Respondent United States of America, dated November 9, 1939, did not make Respondent District secondarily liable to maintain adequate bridges, including any and all reasonable replacements, rebuilding, restoration, enlargement, reinforcement and repairs required to keep the bridges at the specified crossings suitable and adequate for the present and future needs of all common traffic.

The Court of Appeals in its Opinion (R. 1814 to 1827) erred in holding that the word "maintain" did not require Respondents to build from time to time any bridges to keep pace with changing traffic conditions.

The Honorable Trial Court in his Opinion, held that the word "maintain" should not be given a "strait-jacket" definition, but should be given a definition which would carry out the intent of the parties. (R. 1706). It is inconceivable to Petitioner that the parties intended that Respondents expected the City to surrender its streets for occupancy by a canal without reserving the right to require Respondents to maintain structures suitable and adequate to serve the public traffic needs. The bridges which were constructed pursuant to the ordinance of December 11, 1913 (R. 855) certainly could not be used by present day traffic unless modern structures were erected. (R. 1239-1243).

The Record in this case shows that if the word "maintain" is given the meaning assigned to it by the Court of Appeals in its Opinion, Petitioner City could no longer use the bridges in question, but would be required, at its own expense, to construct adequate bridges.

The Petitioner City found it impossible to continue to use the original bridges, and after making request upon Respondent District, and after Congress refused to appropriate money for the construction of these bridges, then the City constructed two bridges at its own cost. The Trial Court allowed the City judgment for the cost of these bridges against Respondent District. (R. 1764). It is the position of Petitioner City that when Respondent District refused to maintain bridges adequate to meet traffic needs, and after Congress had refused to appropriate money therefor, City could construct these bridges and hold Respondent District liable for their payment.

In the case of *Davis Holding Co. v. Wilcox*, 153 A. 169, at page 172 (Conn.), it was stated:

"The word 'maintain' has no precise legal significance in a contract or statute."

In the case of *Rhodes v. Mumery*, 48 Ind. 216, the Court held that the word "maintain" used in connection with the maintenance of a partition fence was properly construed to require the fence to be rebuilt as well as repaired.

In the case of *City of Denver v. Denver City Cable Car Railway Company* (Colo.) 45 P. 434, at page 440, the Supreme Court of Colorado held that the word "maintain" means not only to repair, but to replace as well.

As the Trial Court pointed out, the word should not be made a prisoner of any "strait-jacket" out of the dictionary. In contracts, words are not detached abstractions, and must take color from the subject matter and object in mind (R. 1706).

In the case of *Chicago, R. I. & Gulf Ry. Co. v. Tarrant County Water Control and Improvement Dist. No. 1*, 73 S.W. 2d. 55 (Texas Supreme Court), the Court construed the obligation of a railroad company in constructing its roads across a stream of the Improvement Company, and laid down this rule at page 63:

> "The correlative duty of the appellant imposed by the statute granting the rights named was and is a continuing duty."

At page 69 it was stated by the Court:

> "The railroad company is bound to make and keep its crossing, at its own expense, in such condition as shall meet all the reasonable requirements of the public as the changed conditions and increased use may demand."

Petitioner respectfully urges that the decision of the Court of Appeals was in direct and sharp conflict with the opinion of the Supreme Court of Texas in the case cited. The Texas Courts have also held that it is the duty of cities to maintain streets, and they can neither impair their duty to maintain streets nor contract away their duty to do so. In the case of *Smith v. Grayson County*, 44 S.W. 921 (Texas Court of Appeals, error refused) the Court, in construing a constitutional provision that the Legislature may pass local laws for the maintenance of public roads held that maintenance was not restricted to the upkeep of existing roads, but included the creating of a road system.

In *Tennessee Electric Co. v. White County*, 52 F. 2d. 1065, (United States Court of Appeals for the Sixth Circuit), the Power Company had agreed to construct and maintain certain bridges in order to get the County's permission to build a dam. Parts of the bridges were swept away by a flood, and the Company asserted it was not obligated to replace them because maintenance meant, at most, maintenance under ordinary conditions, just as is contended by Respondents in this case. The Court said at page 1066:

> "The weight of authority, in our opinion, is to the contrary. The cases in which a narrower construction has been adopted are distinguishable upon circumstances not found in the present case."

Apparently, the Opinion of the Court of Appeals for the Fifth Circuit in this case is in conflict with the Opinion of the Court of Appeals for the Sixth Circuit in the *Tennessee Electric Co.* case.

In the case of *State v. Emerson* (Del.) 10 A. 2d. 515, the Court stated:

> "The act, which is a department not only with the duty of laying out and constructing the highways, but to maintain them, and maintenance means not only the keeping in repair but also the continued existence of the highways as a system, arose for public use."

In the case of *Commonwealth v. Inhabitants of Deerfield*, 6 Allen (Mass.) 456, a corporation was obligated to maintain and keep a bridge in repair. A flood washed away part of the banks of the stream and widened the bed of the stream. The Court held that the Company was required to extend the bridges to the new banks thus created.

Petitioner respectfully but earnestly urges that the Trial Court did not base his Opinion in determining the meaning of the word "maintain" upon a context that is "no more expressive and no more accurate than was that used by that master philologist, Humpty Dumpty in his asseveration to Alice that words should be one's servant, not one's masters." (Opinion, page 8; R. 1821). On the contrary, the Trial Court followed the great weight of authority in the Federal Courts in the State of Texas, and in the Courts of many other states.

IV.

The United States Court of Appeals in its Opinion decided an important State question in a way that is in conflict with the applicable State law. *Peoples v. Smith Bros.*, 65 S.W. 2d. 777; *Texas Company v. Texarkana Machine Shops*, 1 S.W. 2d. 928 (no writ history); *City of Beaumont v. Gulf States Utilities Co.*, 163 S.W. 2d. 426 (Texas Court of Appeals, writ refused); *Ennis Waterworks v. City of Ennis*, 144 S.W. 930 (Supreme Court).

ARGUMENT UNDER FIFTH QUESTION

The Honorable United States Court of Appeals for the Fifth Circuit erred in holding that the ordinance and quitclaim deed of November 9, 1939 granted to the United States of America a perpetual right of way in the streets and alleys of the City of El Paso for the maintenance of an irrigation canal without compliance with the plain wording of the Charter of the City of El Paso (Sections 35, 36, and 37, Plaintiff's Exhibit No. 15, R. 227-229) (Appendix "A").

Petitioner, a municipal corporation, can act only under the authority of the State Law and its Charter. The Charter of the City of El Paso relating to easements in streets, and franchises in the streets is governed by Sections 35, 36 and 37 of the Charter of the City of El Paso. It is obvious from a reading of those sections that the City is without power to grant the United States of America an easement in its streets and alleys without complying with the Charter provisions. It is an elementary rule that the owner of land abutting on streets and alleys owns the fee to the center thereof, and a City does not have title to streets and alleys, and any Charter provision to the contrary is in violation of the Constitution of the State of Texas (Article 1, Section 17) (Appendix "D"). *Peoples v. Smith Bros.*, 65 S.W. 2d. 777

A case directly in point is *Texas Company v. Texarkana Machine Shops* (Texas Court of Civil Appeals), 1 S.W. 2d. 928 (no writ history) wherein the Machine Shops sued to enjoin the Texas Company and others to remove certain obstacles from an alleged public street. The Texas Company, Defendant, claimed that they held a deed from the City to the street, and that the City had, by ordinance, closed the same. It was Plaintiff's conten-

tion that the acts of the City in the passage of the ordinance, and in the execution of the deed was ultra vires the City, and was an attempt by the City to deprive Plaintiff of its property without just compensation, in violation of the State and Federal Constitution.

The Court in that case said at page 931:

> "The City or the State has no proprietary rights in the land covered by streets created by dedication or prescription."

We wish to invite the Court's attention to the fact that Respondents cannot successfully take the position that although they do not have title to that part of the streets occupied by the canal, nevertheless they have a perpetual easement for canal purposes covering such portions of the streets as set out in the ordinance and quitclaim deed of November 9, 1939 (R. 239-249).

The Courts of Texas have held to the contrary, and in the case of *Ennis Water Works v. City of Ennis*, 144 S.W. 930, it was stated at page 934 as follows:

> "Whatever may be the law of other states, it is undisputably the settled policy of this state, that monopolies and perpetuities shall not exist under sanction of law. It is therefore the duty of our courts to strike down with mailed hands every contract, whether granted under legislative *or in the exercise of municipal authority*, where exclusive rights and privileges are granted, to the inconvenience or detriment of the public interest." (emphasis supplied).

Respondents claim that the City is estopped to deny the validity of the ordinance and quitclaim deed. However, neither waiver nor estoppel applies to a municipality

when there has been an ultra vires act on the part of the municipality. A case directly in point is *Phillips v. City of Abilene* (no writ history), 195 S.W. 2d. 147. In that case, it was claimed that both waiver and estoppel applied in the face of an ordinance which prohibited officers of the City from waiving compliance with the ordinance as to notice in the case of personal injuries. The Court therein stated:

> "The doctrine of estoppel cannot be invoked to nullify a mandatory statutory restriction."

In this case, it will be noted that Section 37 of the Charter of the City of El Paso provides that "no mere acquiescence or other act or omission of the City Council or City Officers shall be held to confer by estoppel or indirection any such rights . . . ."

Petitioner respectfully urges that the Court of Appeals erred in affirming the Trial Court on this question, as the holding is in conflict with the opinions of the Supreme Court of the State of Texas.

V.

The United States Court of Appeals in its Opinion decided important Federal questions contrary to the former decisions of the Supreme Court of the United States, and also contrary to former decisions of the other United States Courts of Appeals.

The United States Court of Appeals in its Opinion decided important State questions in a way that is in conflict with the applicable State Law.

Nebraska v. Wyoming, 325 U.S. 589, 65 S. Ct. 1332; *Nebraska v. Wyoming*, 295 U.S. 40, 55 S. Ct. 568; *Ickes v. Fox*, 57 S. Ct. 412, 300 U.S. 82; *Louisiana v. Texas*, 20 S. Ct. 251, 176 U.S. 17; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 301 U.S. 92, 58 S. Ct. 803; *Texas Company v. Burkett*, 296 S.W. 273 (Supreme Court of Texas); *Humphreys-Mexia Co. vs. Arseneaux*, 297 S.W. 225; *Nolte Irrigation Co. v. Willis*, 180 S.W. [illegible] 451 (Court of Civil Appeals, writ refused); *United States v. Union Gap Irrigation Company*, 209 F. 274.

ARGUMENT UNDER SIXTH QUESTION

The Honorable United States Court of Appeals for the Fifth Circuit erred in enjoining the City of El Paso, its Mayor, Engineers, and members of its Public Service Board, Superintendent of Water Works, and its agents and representatives, and the successors of each and all of them, from taking water from the river bed of the Rio Grande, or from the Franklin Canal, except in the manner, and in accordance with the rights of said City of El Paso as fixed and determined by the contract of August 10, 1949, which contract is without consideration, and lacks mutuality.

Petitioner earnestly urges that no injunction should have been issued against it in this case prohibiting Petitioner from taking water that it was legally entitled to take from the Rio Grande under the decisions cited herein. The Honorable Trial Court correctly held that Petitioner

under the law was entitled to take an amount of water from the Rio Grande equal to the effluent which the City placed in the Rio Grande.

The Trial Court held that the Rio Grande Compact between the States of Texas, New Mexico and Colorado, were committed to the primary service of the Bureau of Reclamation's Rio Grande Project. The United States Court of Appeals, by implication at least, affirmed this holding. It is Petitioner's earnest belief that both Courts erred in so construing the Rio Grande Compact as it has no bearing upon the distribution of water among the residents of a State once the water reaches such State, and under the authorities cited herein only, the State has control of such water.

Petitioner respectfully urges that no injunction should have been issued against it either by the Trial Court or the Court of Appeals, which would restrain it from taking water out of the Rio Grande, as it seeks to do in this case.

The Trial Court correctly held that the contract of August 10, 1949 was valid only in its aspect as a rental of Project works for use in delivery of water to Petitioner (R. 1727). The contract was for excess waters for which Respondents could have no further use, and to which they had no rights since the Reclamation Act permitted them only a right to water for beneficial use. *32 Stats.* 388, 390.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the proceedings of that Court therein being the case numbered and entitled on its docket as "El Paso County Water Improvement District No. 1, et al vs. City of El Paso, No. 15954;" and that the Judgment of that Court be reviewed and reversed by this Court, and that Judgment be rendered in favor of Petitioner, and that Petitioner have such other relief as it may be entitled to, either at law or in equity.

TRAVIS WHITE
c/o City Hall
El Paso, Texas

H. E. BROCKMOLLER
El Paso National Bank Building
El Paso, Texas

ALLEN R. GRAMBLING
HAROLD L. SIMS
El Paso Natural Gas Company Building
El Paso, Texas

Attorneys for Petitioner

Travis White, one of the counsel preparing the foregoing Petition, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same, and that such Petition is not interposed for delay.

TRAVIS WHITE

I, TRAVIS WHITE, one of the attorneys for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the.....day of June, 1957, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto, as follows:

on: Eugene T. Edwards, Esquire, attorney for Respondents, El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers.

and on: J. Lee Rankin, Solicitor General; David R. Warner, Attorney, Department of Justice; and William H. Veeder, Attorney, Department of Justice, being the attorneys for Respondent, United States of America, said copies to the attorneys for Respondent, United States of America, having been mailed in individually addressed envelopes with airmail postage prepaid.

TRAVIS WHITE

SUBSCRIBED AND SWORN TO before me this 17 day of June, A. D. 1957.

Mary Ellen Dougherty

Notary Public, El Paso County, Texas

Appendix "A"—Sections 35, 36 and 37, Plaintiff's Exhibit No. 15, being portions of the Charter of the City of El Paso

Section 35. The right of control, easement, user and the ownership of and title to the streets, highways, public thoroughfares and property of the City of El Paso, its avenues, parks, bridges, and all other public places and property are hereby declared to be inalienable, except by ordinance duly passed by a vote of three-fourths of all the members of the Board of Aldermen and approved by the Mayor; and no grant of any franchise, or lease, or right to use the same, either on, along, through, across, under or over the same to any private corporation or individual, shall be granted by the City Council for a longer period than thirty years.

The City Council, may, upon its own motion, submit any applications or ordinances requesting the granting of franchises or special privileges in or to the streets, public thoroughfares and highways of the City of El Paso, to an election, at which the qualified ad valorem taxpayers shall vote upon the propositions therein submitted, the expense of which election shall be paid by the applicant or applicants therefor. No such franchise shall ever be granted until it has been read in full at two regular meetings of the Council, nor shall any such franchise, grant, right or easement ever be made to any private individual, corporation, or association unless it provides for adequate compensation therefor, to be paid to the City of El Paso, and in addition to any other form of compensation grantee shall pay annually such a fixed charge as may be prescribed in the franchise. Such grant under and any con-

tract in pursuance thereof shall provide that upon the termination of the grant, the grant as well as the property if any, of grantee, in the streets, avenues and other public places, shall thereupon, without other or further compensation to the grantee, or upon the payment of a fair valuation therefor (the mode of ascertaining which shall be determined in the grant), be and become the property of the City of El Paso, and the grantee shall never be entitled to any payment or valuation because of any value derived from the franchise or the fact that it is or may be a going concern duly installed and operated.

Every such grant shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates, and to maintain the property in good order throughout the life of the grant.

Section 36. Whenever application is made to the City Council of the City of El Paso for any grant or franchise, lease or right to use the streets, public highways, thoroughfares or public property of the City of El Paso, as provided for in the preceding section of this Act, before such ordinance or franchise is introduced in the City Council, it shall be published in full in some daily newspaper published in the City of El Paso twice, the first publication being made at least one week before same is introduced in the City Council. When the same has been passed on its first reading it shall be laid over for at least one week and published in full one time as finally proposed to be passed. If previous to the next regular meeting, four hun-

dred ad valorem taxpayers of the City of El Paso shall, over their own signatures, request the Council to submit the passage of such ordinance and franchise to a vote of the qualified ad valorem taxpaying voters of the City of El Paso, it shall be the duty of the City Council to submit such question to the qualified ad valorem taxpaying voters of the City, and the council shall order and the Mayor shall issue his proclamation calling such election and such ordinance and franchise shall be printed in full in such proclamation, and shall not thereafter be amended or changed. If, at such election, the majority of the votes shall be in favor of said franchise and ordinance, the same shall thereupon become effective, but if the majority of the votes cast be against said ordinance and franchise, the same shall not pass nor shall it confer any rights, powers or privileges of any kind whatever upon the applicant therefor, and it shall be the duty of the City Council to forthwith repeal said ordinance and franchise.

Section 37. No railroad company, street, steam, nor other kind, no telephone, telegraph, electric light, gas company, nor company of any kind, nor person, nor corporation shall ever occupy or use the streets, highways or public places of the City of El Paso for any purpose whatsoever, without first obtaining the consent of the City Council evidenced by the ordinance duly enacted, and no mere acquiescence or other act or omission of the City Council or city officers shall be held to confer by estoppel or indirection any such rights and the provisions of this section shall apply to such rights heretofore and now claimed by them.

Appendix "B"—Rio Grande Compact, Article 7466e-1 of the Revised Statutes of Texas

The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of the States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective Commissioners:

For the State of Colorado—M. C. Hinderlider

For the State of New Mexico—Thomas M. McClure

For the State of Texas—Frank B. Clayton

who, after negotiations participated in by S. O. Harper, appointed by the President as the representative of the United States of America, have agreed upon the following Articles, to-wit . . . .

Appendix "C"—Reclamation Act, Title 43 U.S.C.A., Section 383

Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

Appendix "D"—Constitution of Texas, Article 1, Section 17

Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made, but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

Appendix "E"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15954

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, ET AL.,

Appellants and Cross-Appellees,

versus

CITY OF EL PASO,

Appellee and Cross-Appellant.

(AND REVERSE TITLE)

Appeal and Cross-Appeal from the United States District Court for the Western District of Texas

(April 2, 1957.)

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

HUTCHESON, Chief Judge: El Paso Water Improvement District No. 1, organized under the laws of Texas, five individual land owners, all in the Texas unit of the Rio Grande Federal Reclamation Project, and the United States of America as plaintiffs, brought this suit against the City of El Paso, a Texas municipal corporation, situated in the extreme western limit of the state on the north bank of the Rio Grande River.

The relief sought was the establishment and enforcement as between plaintiffs and the defendant of their respective rights to the use of the water of the river and, as a determining factor therein, the validity and effect of several written contracts between the United States and the plaintiff district, on the one hand, and the defendant City of El Paso, on the other, wherein, for stated considerations, the defendant was given the right to secondary use of the water of the Rio Grande, and, under certain circumstances, the right to use project facilities.

The City contested the claims of the plaintiffs and denied the validity of the ordinances and contracts, including a deed of the city, relied on by plaintiffs.

By way of counter-claim, it sought a recovery from the District of moneys collected from the City for project waters furnished the City and for the use of equipment and facilities, and an injunction against refusing the City free use of the facilities in future.

A further claim was that the United States and the District were liable to it for $51,397.69 for the cost of bridges which the City had been compelled to build across the Franklin Canal because, though under the deed from the City the United States and the District were to keep and maintain bridges across the canal, they had failed to do so.

Finally, attacking the contracts relied on by plaintiffs as invalid and as not having the effect claimed for them, the City sought, as plaintiff had done, a judgment declaring and enforcing its rights.

Thereafter, the case was fully tried to the court without a jury and as fully briefed and argued, and the district judge filed a thoroughly worked out and exhaustive opinion.[1] In it succinctly but comprehensively stating

---

1 El Paso Water Impr. District No. 1, et al vs. City of El Paso, 133 F. Supp. 894 to 927, inclusive.

and documenting the facts and issues and the conclusions of fact and law controlling his decision, he canvassed, discussed, and disposed of, in the main in plaintiffs' favor, the material contentions and counter-contentions of the parties, and entered judgment accordingly. Both plaintiffs and defendants have appealed.

By their appeal, plaintiffs test for error and seek to reverse the portions of the judgment adverse to them, while the defendant, by its cross-appeal, tests for error and seeks to reverse the adjudications contrary to its contentions.

The district judge, in his general grasp of the issues involved and of the law relating thereto, and in the accuracy and precision of his statement of the facts, out of which the issues arise, has done a thorough and workmanlike, indeed a monumental job of setting the case forth in its particulars and as a whole. Because he has, we will not attempt here a general restatement of either the facts or the controlling principles of law. Instead, with respect to the contentions of the parties, as to which we agree with the district judge, we will, stating that we do, refer to and adopt as our own his discussion and decision of the law and the facts; while, with respect to the contentions as to which we disagree with him, we will make a brief statement of our reasons for so doing.

In this view, it becomes unnecessary for us to discuss many of the matters dealt with in the briefs. This is particularly so as to plaintiffs' contention, that the waters of the Rio Grande were committed to the primary service of the Rio Grande Project prior to the effective date of the Rio Grande compact between Colorado, New Mexico and Texas, and the district judge erred in not definitely so declaring. It is sufficient for the purpose of this appeal

to say: that the district court, on grounds sufficient to support the finding, adjudged that they were committed to such primary service; that the water supply contracts of Feb. 18, 1941 and December 1, 1944, between the United States, the District, and the City of El Paso "are valid in all parts"; that the contract of August 10, 1949, between the City and the District "is valid in its aspect as a rental of project works for use in delivery of water to the defendant; and that, in our opinion, it is valid in all its aspects."

Disposing first of the city's cross appeal and the attacks upon the judgment it puts forward, it is sufficient to say that, upon the facts found and for the reasons assigned by the district judge, we are of the clear opinion that none of them are well founded and that, as against each claim of the cross-appeal, the judgment must be affirmed.

Of the opposite opinion as to those parts of the judgment complained of in plaintiffs' appeal,[2] we shall, in

---

[2] While the brief for all of the appellants, except the United States, presents 14, and that of the United States presents 11 specifications of error, the only provisions of the judgment under attack are those declaring

(1) That plaintiffs, United States and the District, failed to perform their bridge maintenance obligations at the Piedras and Verde Street crossings of the canal, but "the governing contingency bars primary liability of the plaintiff United States ... wherefor the secondary liability of the District is in effect", and accordingly, the defendant city is awarded judgment in the total sum, including interest, of $44,053.95 for expenses incurred by it in placing reasonably adequate bridges over the canal at those streets.

(2) That the obligation to "maintain" bridges at certain points includes the obligation to rebuild and replace such bridges though in a good state of repair.

(3) That El Paso County Water Improvement District No. 1 is liable to City of El Paso for cost of replacing bridges of different structural design.

(4) That the City of El Paso may take "pay free" from the Rio Grande an equivalent of the amount of sewage effluent voluntarily dumped into the river by it.

addition to declaring that these portions of the judgment may not stand, and that as to them the judgment must be reversed, state as briefly as possible our reasons for thinking so.

Further, since the appeal is from the judgment and not from the opinion, and it is our view that the decision of each of the questions raised by appellants' attack upon the judgment is governed by the written instruments the plaintiffs rely on, that it must be based upon the principles of law which govern their construction and application, we shall, though the opinion and the briefs took wider range, confine the discussion in our opinion within those limits.

Turning first to the matters having to do with bridges, and dealt with, in the court's opinion at pp. 910 to 916, under the head "Franklin Canal", and at pp. 916 to 918 under the head "Bridges", and in Pars. III and VIII of the decree under the same head, and Par. IX "Money Judgments", we find ourselves in complete agreement with the opinion of the district judge, and with Par. III of his

decree adjudicating, that the deed from the City conveying to the United States all of the City's right, title and interest in and to the right-of-way occupied by the Franklin Canal, along and across the streets, alleys, and other public lands of the City of El Paso, is valid and binding upon both grantor and grantee.

We cannot, however, reconcile with this conclusion and decree, and, therefore, cannot agree with the further conclusion in the opinion under the head "Bridges" and in the adjudication in Par. VIII in the decree that the burden of maintenance in respect to bridges imposed by the contract[3] "includes any and all reasonable replacements, re-

---

[3] In these terms: "This conveyance is subject to the condition that the United States shall be obligated to maintain the said bridges at said described crossings, contingent, however, upon appropriations being made therefor by congress, and there is further reserved to the said City of El Paso, the right to construct and maintain at its own cost and expense such additional bridges and other structures across said canal other than those hereinabove designated as it may deem necessary". El Paso County Water Impr. Dist. No. 1 v. City of El Paso, 133 F. Supp. at p. 917

building, restoration, enlargement, reinforcement and repairs of said bridges which may be required to keep at the specified crossings bridges suitable and adequate for the present and future needs of all common traffic at each of said locations, whatever the growth in such traffic density over the years". Neither can we reconcile them with the conclusion that the obligation extends to two new bridges constructed by the City at Piedras and Verde Streets, respectively, or with the provision in the decree under the head of "Money Judgments", adjudging that the plaintiff district is liable for $44,053.95 expenses incurred by the City therefor.

It seems to us that, with nothing in the record upon which to base such a finding, the district judge has in effect found that the United States and the District assumed a potential liability of incalculable and undeterminable extent and amount.

The briefs of the parties cite and argue decisions construing the word "maintain" in various contexts. While it seems to us that appellants have far the better of that kind of argument, we are of the opinion that the case is not one which requires or permits of resort to interpretation or construction, but one in which the plain and simple language of the deed under the undisputed facts compel the rejection out of hand of the construction given by the court to the language and the reversal of those portions of the decree which declare the obligation and its breach and impose a money judgment therefor.

The trial court, in his opinion, recognizing the dictionary meaning of the word "maintain", declared:

> "The word 'maintain' when directed to the subject of some structure ordinarily means to keep it in repair and in virtually the same serviceable state. At the same time the words should not be made a prisoner of any strait jacket out of the dictionary."

We think with appellants that this is an excessive figure of speech. We think, though, that in context it is no more expressive and no more accurate than was that used by that master philologist, Humpty Dumpty in his asseveration to Alice that words should be one's servants, not one's masters, and that when he used a word he expected it to mean what he chose it to mean. We agree with appellants also that it is not supported by either Texas decisions or decisions generally. Cf. *Malone v. El Paso Co., etc.*, 20 SW 2d 815, in which the Court of Appeals said, "The term maintain in Webster's International Dictionary, which has become in effect a law book on questions, is defined to mean to hold or keep in any particular state or condition, to support, to sustain, to uphold, to keep up* * *". Cf. also *Hobby v. Hodges*, 215 F 2d 754.

Applying these principles to the word "maintain" used in the deed under which the United States holds, it is quite plain that, in its common acceptance, it simply did not mean anything like what the court held that it did. The distinction between construction and maintenance was recognized by the City of El Paso in the deed itself when it reserved the right to CONSTRUCT and MAINTAIN at its own cost "additional bridges across the canal at other points".

With all deference to the conscientious and able district judge, we are of the firm opinion that he entirely lost sight not only of the definitive language consciously used in the deed but of the circumstances under which the deed and contract were made when he held that the clear and simple language of the deed, which referring to the 31 bridges named declares the obligation of the United States with respect to them to be to *maintain* those bridges, "imposes an obligation *to build from time to time new bridges of an entirely different construction and design to keep pace with changing traffic conditions.*" Emphasis supplied.)

Having held that the contract does not impose a liability for the construction of bridges of the kind in question here or for payment for those already constructed, and that the adjudications in Par. VIII under the head of "Bridges" and in Par. IX of "Money Judgments", must be reversed, it is unnecessary for us to determine or even to consider appellant's contention that even if the United States did make itself liable, as claimed by the city, the district could not be held liable therefor, secondarily or otherwise.

When we come to the question of the "sewage effluent,"[4]

[4] This is dealt with directly in the opinion of the district court under that head at pp. 925-6, and indirectly under the head of "Contract of Aug. 10, 1949" on pp. 922-24 of the opinion and in the decree under Par. IV "Contracts" and Par. VI "Effluent Offset".

we find the district judge rejecting, as without material bearing on it, both the contract of August 10, 1949, and the compromise settlement of the contest over the City's application to the Texas Board of Water Engineers for a permit.

Having thus put aside as of no weight, and denied effect to, matters of contract which seem to us controlling, the district judge, declaring:

> "The fair and equitable rule is that the City for the foreseeable future should be entitled to make direct diversions for municipal use from the river without having to pay for such water so long as such diversions are less in value than the outfall to the river."

stated: "The City has no traditional riparian right to exercise, but it is located on the river, with many miles of river frontage, * * so there is no strain of equity in saying" that it must be regarded as in as good a position as one who, having no water rights, takes water, is yet not held liable for so taking it to persons who are unable to demonstrate any substantial or tangible injury therefrom.

Appellants, joining issue with these views, point out that the City has never been a part of the Rio Grande Project; that it has never, since the project was established had any but a contract right with that project to take water from the Rio Grande; and that the permit of May 10, 1950, issued by the Texas Board of Water Engineers, to be applied to the waters if any in that area

over which it may have jurisdiction, does not in terms or by inference purport to authorize *the City to take from the Project waters the equivalent of sewage dumped into it.* So pointing they insist that, under the circumstances, the City in the absence of a contract authorizing it to do so, cannot lawfully take project water *which, by the express agreement of the city, the sewage effluent is when it reaches the river, while it is still under control of the Bureau of Reclamation;* that for an even stronger and better reason, the contract of August 10, 1949, definitely determines that the defendant has no such right; and that, in holding merely that this contract was valid in its aspects as rental of project facilities and not holding that it was valid in all respects, the court erred.

We agree with the appellants and think that a brief reference to some of the provisions of the contract and the circumstances under which it was executed, will conclusively demonstrate the correctness of their claims.

Among the provisions of the Contract are these:

> "Whereas, there has been appropriated under the laws of New Mexico and Texas, for and on behalf of the Rio Grande Federal Irrigation Project, comprising lands of the district and the Elephant Butte Irrigation District * * * and the *district claims all such appropriations cover all of the appropriable Waters of the Rio Grande River for the irrigation of lands in said districts;* and
>
> "Whereas, the city has urged a claim in equity against the project for sewage effluent placed in the river from the city's operation of its sewage and water systems * * *; and

"Whereas, *it is the desire of the district and of the city to cooperate to the end of avoiding controversy and litigation between themselves and to settle and compromise their respective claims involving relative rights and priorities* of the use of the waters hereinabove referred to, * * *;

"Now, therefore, it is agreed: (1) that the district, subject to approval hereof by the Secretary of the Interior of the United States, will permit use, by the City, of Rio Grande Project Works serving the district lands for the purpose of its agreement * * * *all as determined by the Project manager of the Rio Grande Project.*" (Emphasis supplied.),

Par. 2 gives the city the right, under stated conditions to take from the river, water in excess of Project needs. Par. 7 fixes the consideration the city is to pay, and Par. 10, reciting that the city is now discharging and may in future discharge sewage effluent, goes on to provide:

"It is expressly understood that in executing this contract or accepting the benefits thereof, the city shall not be held to have anywise *relinquished, modified, or impaired its title to, or ownership of, the right to control and determine the use and disposition of such effluent prior to its discharge into the Rio Grande. It is further understood that if such effluent is discharged into the Rio Grande, it constitutes a part of the Project water supply.*" (Emphasis supplied.)

In the light of these provisions of the contract and of the further facts noted in the opinion of the court: that "the contest over the defendant's application for a permit did not come to a showdown"; and that "under the contract in question, the protestants withdrew their opposi-

tion and defendant was left free to prosecute its application to a conclusion but with the reservation that any permit would be subject to the terms and conditions of this undertaking"; it seems entirely clear to us that the contract binds the city against, and prevents, the assertion of, the claim it now makes.

Apparently of the opinion that the settlement was not binding because, as he states, the district had nothing to sell except the use of its project facilities, the district judge seems to have gone off on the theory that the contract was lacking in mutuality and was not supported by consideration. In so holding, we think it plain that he erred. It is too well settled to require much citation of authority that a bona fide contest furnishes adequate consideration for a contract of settlement. *U.S. v. Westside Irrigation Co.*, 230 Fed. 284. Texas law is firmly established that valuable consideration for a contract is either benefit to the promisor or detriment to the promisee, or a surrender by the promisee of some legal right. An inspection of the various provisions and paragraphs of the contract of August 10, 1949, discloses full and adequate consideration to support all of its undertakings and obligations, and, in addition, after its execution, the City of El Paso recognized the contract of August 10, 1949, as binding on it and accepted the benefits conferred thereby.

Further, on the first day of December, 1949, there was a written contract entered into between the City, the District, the United States, the Department of the Interior, the Rio Grande Project, and others, and filed in a proceeding before the Board of Water Engineers in which it was agreed that the contract of August 10, 1949, had been executed, that it became effective as of September 23, 1949, that it now stands as a valid and binding con-

tract between the City of El Paso, applicant herein, and the Water District, and that said contract is now in full force and effect.

It is established without dispute: that plaintiff district and the others withdrew their protests against the application of the city for a permit under a stipulation that the board should grant the city's application, subject to the terms and conditions of the contract of August 10, 1949; and that after the Board of Water Engineers on May 8, 1950, had issued to the City a permit based on its application, purporting to authorize it to divert from the river, under stated conditions, a certain quantity of the public water of the State of Texas, the City of El Paso and the El Paso District in writing, dated June 22, 1950, again agreed with each other that the permit was subject to the contract of August 10, 1949, which it was further agreed was still in effect.

While the defendant in its brief, urges in opposition to these views that it is equitably entitled to take from the river as much as it puts into it, citing *Texas Co. v. Burkett*, 296 SW 273 and *Humphreys v. Arseneaux*, 297 SW 295, it also denies that the contract of August 10, or any of the contracts has any valid bearing in the case.

We do not think there is any sound basis for either of these positions, and we are in no doubt that the complained of provisions of the decree were erroneous and must be reversed.

The decree appealed from will be AFFIRMED as to all of cross-appellant's claims against it. As to appellants' claims against it, it is REFORMED in accordance herewith, and, as reformed, it is AFFIRMED.

Appendix "F"

JUDGMENT

Extract from the Minutes of April 2, 1957

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, ET AL.,

No. 15954

versus

CITY OF EL PASO.

(AND REVERSE TITLE)

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the decree of the said District Court appealed from in this cause be, and the same is hereby, affirmed as to all of cross-appellant's claims against it, as to appellant's claim against it that said decree be and it is hereby, reformed in accordance with the opinion of this Court, and as reformed, it is affirmed:

It is further ordered and adjudged that the appellants & cross-appellees, El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers, and the surety on the cost bond herein, General Casualty Company of America, Seattle, Washington, be condemned, in solido to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Appendix "G"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15954

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, ET AL.,

Appellants and Cross-Appellees,

versus

CITY OF EL PASO,

Appellee and Cross-Appellant.

AND REVERSE TITLE

Appeal and Cross-Appeal from the United States District Court for the Western District of Texas

(May 24, 1957.)

ON PETITION FOR REHEARING

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

PER CURIAM: It is ORDERED that the petition for

rehearing in the above entitled and numbered cause be, and it is hereby

DENIED.

CAMERON, Circuit Judge, Dissenting:

Upon reading again the opinion of the Trial Judge, as reported in 133 F. Supp. pp. 894-927, I am impressed anew with the fact that the case was skilfully handled and properly decided in the Court below by a Judge who spent much time in its trial, much study in mastering the intricate questions of mixed law and fact involved, and who brought to its decision much wisdom based upon long experience with those problems and an intimate knowledge of the local conditions involved in their solution. I find myself unable to subscribe to a conclusion at war with those upon which the judgment of the Court below was entered.

I would grant the petition for rehearing, set aside the order entered pursuant to the opinion of this Court filed April 2, 1957, and would enter a judgment affirming *in toto* that of the Court below. I dissent, therefore, from the order denying the petition for rehearing.

Appendix "H"

Order Staying Mandate Filed:—June 1, 1957

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, ET AL.,

Appellants and Cross-Appellees,

No. 15954

versus

CITY OF EL PASO,

Appellee and Cross-Appellant,

(AND REVERSE TITLE)

ON CONSIDERATION OF THE APPLICATION of the Appellee & Cross-Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable them to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate

of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 1st day of June 1957.

J. C. HUTCHESON, JR.

United States Circuit Judge.

LIBRARY
SUPREME COURT, U.S.

198

Office - Supreme Court, U.S.
FILED
JUL 12 1957
JOHN T. REY, Clerk

~~No. 1096~~

RECEIVED
JUL 12 1957
OFFICE OF THE CLERK
SUPREME COURT, U. S.

~~198~~

In the

Supreme Court of the United States

OCTOBER TERM, 1956

CITY OF EL PASO,

Petitioner,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, L. D. MCCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BRIGGS and W. L. SUMMERS, together with THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION FOR ALL RESPONDENTS EXCEPT THE UNITED STATES OF AMERICA

EUGENE T. EDWARDS,
11th Floor Bassett Tower,
El Paso, Texas,
Counsel for said Respondents.

LOUIS A. SCOTT,
1100 First National Building,
El Paso, Texas,
Of Counsel.

INDEX

Subject Index

	Page
Opinions Below	1-2
Jurisdiction	2
Questions Presented:	
I. Whether the Court below correctly decided the case upon the basis of the contracts alone	2-3
II. Whether the City of El Paso may take pay free from the Rio Grande an amount of water equal to sewage voluntarily discharged by it into the river	3
III. Whether obligation to "maintain" bridges includes obligation to tear out good bridges and rebuild with new structures of different basic design	3-4
IV. Whether quitclaim deed from City of El Paso to U. S. A. is valid	4
V. Whether City of El Paso was correctly enjoined from taking water from Rio Grande except as authorized by decree	4
Constitutions and Statutes Involved	4-5
Statement	5-9
Argument	9-42
I. In support of an affirmative answer to our Question I, page 2, and in reply to Question No. 1, Petition 3, and to Reasons for Granting Writ of Certiorari, Petition 13, and Argument Thereunder, Petition 14-20	13-24
II. In support of an affirmative answer to our Question II, page 2, and in reply to Question No. 2, Petition 4, and Argument Thereunder, Petition 20-23	24-29

Subject Index—(Continued)

	Page
III. In support of an affirmative answer to our Question III, page 2, and in reply to Questions Nos. 3 and 4, Petition 4, and Argument Thereunder. Petition 23-27	29-39
IV. In Support of an affirmative answer to our Question IV, page 3, and in reply to Question No. 5, Petition 4, and Argument Thereunder, Petition 28-30	39-40
V. In reply to confused last portion of petition	40-42
Conclusion	42
Appendices	43-81

Page

Cases

American Air Lines v. Civil Aeronautics Board, 178 F. 2d 903 21

Austin Mill & Grain Co. v. Brown County Water Improvement District No. 1, 128 S. W. 2d 829 38

Barber Asphalt Paving Co. v. Hezel, 56 S. W. 449 35

Charles Scribners Sons v. Marrs, 113 Tex. 11, 262 S. W. 722 29

Chidester v. City of Newark, 162 F. 2d 598 31

City of Crosbyton v. Texas-New Mexico Utilities Co., 157 S. W. 2d 418 10

City of El Paso v. Mendoza, 191 S. W. 2d 102 39

City of San Angelo v. Deutch, 145 Tex. 372, 91 S. W. 2d 308 10

Clayborn v. Gambill, 87 S. W. 2d 508 32

Cox v. Hart, 260 U. S. 427, 67 L. Ed. 332 21

Curdy v. Stafford, 88 Tex. 120, 30 S. W. 551 32

Davis v. Field, 222 S. W. 2d 697 32

Davis v. Texas Co., 232 S. W. 549 32

Farmers State Bank of Mineola v. Mincher, 290 S. W. 1090 12

Garrity v. Rainey, 112 Tex. 369, 247 S. W. 825 13

Gillam v. City of Fort Worth, 287 S. W. 2d 494 29

Gravis v. Rogers, 214 S. W. 2d 886 32

Great Northern R.R. Co. v. Delmar Co., 283 U. S. 686, 75 L. Ed. 1349 36

Page

Hudspeth County Conservation & Reclamation District No. 1 v. Robbins, 213 F. 2d 425 24

Huffman v. State Roads Comm., 137 Atl. 358, 152 Md. 566 35

Humble Oil & Ref. Co. v. Harrison, 146 Tex. 216, 205 S. W. 2d 355 32

Ickes v. Fox, 300 U. S. 82, 81 L. Ed. 525 22, 24

Kaderly v. Multnomah County Court, 52 Pac. 515, 32 Oreg. 560 35

L. & N. Ry. v. Godman, 4 N. E. 163 35

Lee v. Lee, 275 S. W. 2d 574 11, 12

Love v. Rockwall Independent School District, 194 S. W. 659 34

MacEvoy v. United States, 322 U. S. 102, 88 L. Ed. 1163 21

Madely v. Trustees of Conroe Independent School District, 130 S. W. 2d 929 34

Malone v. El Paso County Water Improvement District #1, 20 S. W. 2d 815 31, 34, 35

Mayfield v. Eubank, 278 S. W. 243 11

McNeal v. City of Waco, 89 Tex. 83, 33 S. W. 322 38

Nebraska v. Wyoming, 295 U. S. 40, 79 L. Ed. 1289 23, 24

Nebraska v. Wyoming, 325 U. S. 589, 89 L. Ed. 1815 23, 26

Pace v. Jackson, 284 S. W. 2d 340 12

Pitts v. Camp County, 120 Tex. 558, 39 S. W. 2d 608 32

Page

Portland Gasoline Co. v. Superior Marketing Co., 150 Tex. 533, 233 S. W. 2d 823 12

Rettig v. Houston West End Realty Co., 254 S. W. 765 32

Russell v. Ely, 2 Black (67 U. S.) 575 31

Ryan v. M. K. & T. R. Co., 65 Tex. 13 36

Saltmount Oil Corp. v. Imperial Crown Royalty Corp., 98 S. W. 2d 418 31

Soulsberry v. Maddix, 125 F. 2d 430 32

State v. Wilder, 98 S. W. 465 35

Stevenson v. Blake, 131 Tex. 103, 113 S. W. 2d 525 38

St. Louis S. W. Ry. Co. of Texas v. Davy Burnt Clay Ballast Co., 273 S. W. 630 31, 32

Sutton v. United States, 157 F. 2d 661 21

T. & N. O. R. Co. v. Galveston County, 148 Tex. 71, 169 S. W. 2d 713 38

Tennessee Electric Co. v. White County, 52 F. 2d 1065 30

Texas Agricultural Assn. of Edinburgh v. Hidalgo County Water Control & Improvement District #1, 125 F. 2d 829 38

Texas Farm Bureau Cotton Assn. v. Stovall, 113 Tex. 273, 253 S. W. 1101 12

U. S. v. Gerlach Livestock Co., 339 U. S. 725, 94 L. Ed. 1231 22

U. S. v. West Side Irrigation Co., 230 Fed. 284 11

Watkins v. Certain-Teed Products Corp., 231 S. W. 2d 981 32

Table of Authorities—(Continued)

	Page
Wood Motor Co. v. Nebel, 150 Tex. 86, 238 S. W. 2d 181	36
Young v. Rudd, 226 S. W. 2d 469	32

Statutes, Ordinances and Constitutions

32 Stat. 388—Reclamation Act	2, 4, 5, 20, App. B., pp. 61-64
33 Stat. 814—Extending above to Part of Texas	5, App. C., p. 64
34 Stat. 259—Extending Act to All of Texas	5, App. D., p. 65
36 Stat. 557—New Mexico "Enabling Act"	2, 5, App. F., p. 67
62 Stat. 928, 28 U. S. C. Sec. 1254(1)	2
U. S. Code, Title 43, Sec. 383	20, 21
Revised Civil Statutes of Texas:	
Article 7466e-1 (Rio Grande Compact)	3, App. A., pp. 43-61
Articles 7547, 7548, 7549, 7587, 7588, 7622, 7653, 7657, 7752, 7807-d-Sec. 6, and 7880-53	4, 5, App. K., pp. 72-81
Special Territorial Laws of New Mexico	2, 5, App. E., pp. 65-67
U. S. Constitution, Art. 1, Sec. 8, Cl. 1	21, 22
Texas Constitution, Art. 16, Sec. 59	5, 37, App. H., pp. 68-69
New Mexico Constitution, Art. 21, Sec. 7	2, 5, App. G., pp. 67-68
Charter, City of El Paso, Secs. 1, 2, and 92	10, App. J., pp. 70-72

Page

Other Authorities

10 Tex. Jur. 111, Sec. 64, et seq. 11
Kinney on Irrigation & Water Rights, 2d Ed. 26
Webster's International Dictionary 32

In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1096

CITY OF EL PASO,

Petitioner,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, L. D. MCCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BRIGGS and W. L. SUMMERS, together with THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION FOR ALL RESPONDENTS EXCEPT THE UNITED STATES OF AMERICA

OPINIONS BELOW

The opinion of the District Court does not accompany the Petition as an Appendix, but is to be found in the Record at page 1658 of Volume III, and is reported as

El Paso County Water Improvement District No. 1, et al., v. City of El Paso, 133 F. Supp. 894. The opinion of the Court of Appeals for the Fifth Circuit and the dissenting opinion (App. E of Petition) are reported at *243 F. 2d 927.*

JURISDICTION

Respondents do not concede jurisdiction to be in this Court on any of the grounds invoked by Petition, page 2, but it does have jurisdiction under *62 Stat. 928, 28 U. S. Code, Sec. 1254(1)*, should it believe such jurisdiction should be exercised.

QUESTIONS PRESENTED

It is the opinion of these Respondents that the Petition, pp. 3-5, does not accurately state the questions actually presented to this Court as the result of the decision herein by the Court of Appeals for the Fifth Circuit, and for that reason we present the following:

I

Whether, without determining the question of whether the rights of the parties in the waters of the Rio Grande originated under the Reclamation Act of June 17, 1902 *(32 Stat. 388)*, as extended to Texas, in conjunction with the Special Territorial Laws of New Mexico relating to the acquisition of water rights by the United States for irrigation works, together with the "New Mexico Enabling Act" *(36 Stat. 557), Article 21, Section 7*, of the Constitution of New Mexico, and the law of Texas, including its stat-

utes, or originated in the Rio Grande Compact of 1938 between the States of Colorado, New Mexico and Texas *(Article 7466 e-1, Revised Civil Statutes of Texas, U. S. Public Law No. 96, May 31, 1939, ch. 155, 53 Stat. 785)*, the Court of Appeals correctly decided the issues between the parties as to rights in the use of waters of the Rio Grande on the basis of their rights as established by the several contracts existing between them. Petitioner itself admits that the Court of Appeals passed on the Rio Grande Compact only by implication (Petition, p. 20).

The solution of this question lies in the determination of whether these contracts are valid. If they were, as Respondents contend, and as the Court of Appeals held, it is immaterial, as regards this case, where the water rights originated.

II

Whether the Court of Appeals correctly held that Petitioner, City of El Paso, had no right to take, pay free, from the bed of the Rio Grande an amount of fresh water equal to the sewage effluent which it currently discharges into the river bed.

III

Whether the primary obligation of the grantee in the quitclaim deed from the City of El Paso, as grantor, to the United States dated November 9, 1939, and the secondary obligation of the Respondent, El Paso County Water Improvement District No. 1, to "maintain" bridges across the Franklin Canal at certain street intersections excludes

the obligation to replace existing bridges, which have been maintained in a good state of repair by the grantee, with entirely new bridges of a completely different structural design.

IV

Whether the quitclaim deed from the City of El Paso to the United States of America (Plaintiff's Exhibit 18, R. I, 245), dated November 9, 1939, conveying all of the City's right, title and interest, if any, to the Franklin Canal extending through the City as a facility of the Rio Grande Federal Reclamation Project is valid.

V

Whether the District Judge properly enjoined the City of El Paso, and those acting for it, from taking water from the bed of the Rio Grande or from the Franklin Canal except in the manner and in accordance with its rights as determined by the decree.

CONSTITUTIONS AND STATUTES INVOLVED

It is thought that statutes and organic state laws are not involved in the determination of whether the Court of Appeals correctly decided the case, but if material to a determination of whether the holding of the Court of Appeals was correct, they are:

Article 7644e-1, Revised Civil Statutes of Texas (Rio Grande Compact of 1938)[1]; Act of June 17, 1902 (Reclamation Act), 32 Stat. 388, Chap. 1093, sections

[1] Appendix A.

4 and 8;[2] Act of Feb. 25, 1905 (33 Stat. 814), extending Reclamation Act to part of Texas;[3] Act of June 12, 1906 (34 Stat. 259), extending Reclamation Act to all of Texas;[4] Special Territorial Laws of New Mexico, 36th Legislative Assembly, Ch. 102, Sec. 22, Laws of 1905;[5] Special Territorial Laws of New Mexico, 37th Legislative Assembly, Ch. 49, Sec. 40, Laws of 1907;[6] The New Mexico "Enabling Act" (36 Stat. 557);[7] the Constitution of New Mexico, Article 21, Sec. 7;[8] the Constitution of Texas, Article 16, Sec. 59;[9] together with certain Articles of the Revised Civil Statutes of Texas set out in Appendix K.

STATEMENT

Believing that Petitioner's statement of the case as made by it, Petition, 5, et seq., is confusing and substantially incorrect in several respects, the following is submitted:

Respondent, El Paso County Water Improvement District No. 1, a conservation and reclamation district, duly organized under the laws of Texas, is the Texas unit of the Rio Grande Federal Reclamation Project established in 1906 by the United States Government under the Reclamation Act of 1902, and lying partly in two states, that is, New Mexico and Texas. All Project facilities are owned and operated by the United States of America[10] and not by the District as erroneously stated by Petitioner in its Statement and elsewhere in the Petition.

[2] Appendix B.
[3] Appendix C.
[4] Appendix D.
[5] Appendix E.
[6] Appendix F.
[7] Appendix G.
[8] Appendix H.
[9] Section 6 of the Reclamation Act, Appendix B.

This suit was filed by the District and five of its individual landowners, joined by the United States of America, against the City of El Paso, a Texas municipal corporation situated at the extreme western limit of the State of Texas on the north bank of the Rio Grande, for a declaratory judgment to establish the plaintiffs' claimed primary right to the use of the waters of that river and to enforce by injunction several written contracts between the United States and the plaintiff District on the one part and the defendant City of El Paso on the other part,[1] wherein, for stated considerations, the City was given the right to the secondary use of the waters of the Rio Grande, and, under certain circumstances, the right to use Project facilities.

The suit is also for the purpose of collecting money due from the City on these contracts and to establish by court judgment the incorrectness of the City's claim that the United States was primarily liable and the District secondarily liable to the City to repay to it the cost of tearing out existing bridges across the Franklin Canal, which bridges admittedly had been kept in a good condition of

[1] Contract dated Feb. 18, 1941, between the United States of America, the City of El Paso, Texas, and the El Paso County Water Improvement District No. 1 (Plaintiffs' Exhibit 27, R. I. 409); Contract between the United States of America, the City of El Paso, Elephant Butte Irrigation District, and El Paso County Water Improvement District No. 1, dated Dec. 1, 1944 (Plaintiffs' Exhibit 29, R. I. 426); Contract dated Aug. 10, 1949, between the City of El Paso and El Paso County Water Improvement District No. 1, approved by the United States (Plaintiffs' Exhibit 32, R. I. 560); Contract dated Dec. 1, 1949, between the City of El Paso, El Paso County Water Improvement District No. 1, United States of America and the Department of the Interior of the United States of America, Rio Grande Project, Hudspeth County Conservation and Reclamation District No. 1, Fort Quitman Land Company, et al. (Plaintiffs' Exhibit 33); and Contract dated June 22, 1950, between the City of El Paso and El Paso County Water Improvement District No. 1 (Plaintiffs' Exhibit No. 34, R. I. 586).

repair by the United States, and replacing them with completely new bridges of entirely different structural design, which claim of the City was based on the language of a quitclaim deed from it to the United States of America, dated Nov. 9, 1939,[1] wherein the City conveyed to the United States all of the City's right, title and interest in and to the Franklin Canal and appurtenances through the City (the major portion of which had already been acquired by the United States from private owners), and in said deed it was provided that the United States shall be obligated to "maintain" certain bridges which were already in existence across the Canal at specified street intersections, "contingent, however, upon appropriations being made by Congress," and by resolution on the same date as that of the deed, the Board of Directors of the District had obligated it to furnish funds for the maintenance of said bridges whenever such funds are not appropriated by Congress or furnished by the Federal Government. (Amended Complaint, R. I, 13-49.)

The City denied the validity of this quitclaim deed and all of the contracts between it and the United States and other plaintiffs, being Respondents here; claimed riparian rights for itself in the waters of the Rio Grande, and that Respondents have no rights to the waters of the Rio Grande except under the general appropriation laws of Texas: that it should have credit for sewage effluent discharged by it into the river; and sought to recover by way of counterclaim the cost of new bridges erected by the City across

[1] Plaintiffs' Exhibit No. 18, R. I, 245.

the Franklin Canal at three different street intersections (Amended Answer and Counter-Claim, R. I, 51-75.)

The District Judge adjudged and decreed that the quit-claim deed and all of the contracts between the parties were valid in their entirety except the contract of August 10, 1949, between the City of El Paso and the District relating to sewage effluent and other matters, which he held to be valid and binding only in its aspect as a rental of Project works for use in delivery of water to the City (R. III, 1756); with the result that the City was entitled to take "pay free" from the river bed on the City water front an aggregate quantity of Project water equal to the quantity of sewage effluent discharged currently into the river (R. III, 1757-1759); that the water of the Rio Grande to which the United States is entitled for the benefit of the Rio Grande Project and that belonging to Texas is definitely committed to the service, primarily, of the Rio Grande Project only by force of the Rio Grande Compact of 1938 between Colorado, New Mexico and Texas (R. III, 1753-1754); that the obligation of the grantee in the deed from the City of El Paso to the United States dated November 9, 1939, to "maintain" bridges also includes "any and all reasonable replacements, rebuilding, restoration, enlargement, reinforcement and repairs" (R. III, 1760); and that the City should recover from the District $44,427.59 as the cost to it of rebuilding two bridges, by reason of the District's secondary liability (R. III, 1760-1761).

On appeal the Court of Appeals held that all of the contracts were valid in their entirety and it was unnecessary

to go into the question of where the rights of the landowners of the District in the waters of the Rio Grande originated, and that it was so plain from the wording of the quitclaim deed of November 9, 1939, from the City to the United States, that the provision for maintenance of bridges did not include the tearing out of bridges which had been kept in good repair by the United States and replacing them with new structures of different design, that consideration of the District's contention that it could not be held liable for such new erections because of the prohibitions imposed on the incurrence of this nature of debt by the Texas Constitution was not required (Petition, App. "E", p. 41).

Thus the validity of the contracts between the parties was the entire basis of the holding of the Court of Appeals.

ARGUMENT

The Decision of the Court Below Is Clearly Correct.

As previously stated this suit was brought to enforce the several written contracts between the City of El Paso and Respondents.

The first of these was dated February 18, 1941, between the United States of America, the City of El Paso and the El Paso County Water Improvement District No. 1, which was later supplemented by the amendatory contract dated December 1, 1944, between the same parties and also the Elephant Butte Irrigation District. They appear in full as Plaintiffs' Exhibit 27, R. I, 401-421, and Plaintiffs' Exhibit 29, R. I, 427-443.

The purpose of the contracts was to furnish a supplemental supply of water for municipal purposes to the City of El Paso, within the limitations of the Reclamation Act.

Unquestionably these were contracts which the City had the power to make under Sections 1, 2, and particularly 92, of its charter (Appendix J), and it is equally clear that in doing so it was acting in its proprietary capacity, and not in the exercise of a governmental function, for it was contracting for the private interests of its inhabitants or itself. *City of San Angelo v. Deutch, 145 Tex. 372, 91 S. W. 2d 308; City of Crosbyton v. Texas-New Mexico Utilities Co., 157 S. W. 2d 418, 420-421, wr. ref. n.r.e.*

That these contracts were each supported by adequate consideration is obvious from reading them, for the proposition that mutual promises are adequate consideration for a contract is too well settled to require citation of authority.

Then came the contract of August 10, 1949, between the City of El Paso and the El Paso County Water Improvement District No. 1, approved by the United States (Plaintiffs' Exhibit 32, R. I, 509). It fixed the rights of the City, subject to the previous contracts, to take water from the Rio Grande under circumstances therein set forth, and in connection therewith to use Project facilities in the manner limited by the agreement.

It is plain from the language used therein that the primary object sought to be accomplished by the parties was the securing by the City of physical facilities for diversion

of such water as it could secure a right to take from the river and "avoiding litigation between themselves and to settle and compromise their respective claims." This settlement and compromise was itself adequate consideration for the agreement. *United States v. West Side Irrigation Company, 230 Fed. 284, 289-290 (affirmed, West Side Irrigation Company v. United States, 246 Fed. 212, C. C. A. 9).*

In the case at bar, the Respondents were under no obligation to allow the City of El Paso to use Project facilities at any price, and the City did not have the right to take water from the river at any time to the prejudice of Project water users. Respondents had protested an application to the State Board of Water Engineers by the City for authorization to use certain water from the river. They had a legal right to continue this protest, but under paragraph 12 of the contract gave it up on condition that the City consent to any permit granted thereunder being subject to the contract.

Texas law is firmly established that "valuable consideration" for a contract is either benefit to the promisor, or detriment to the promisee, or surrender by the promisee of some legal right *(Mayfield v. Eubank, 278 S. W. 244, wr. ref.; 10 Tex. Jur. 111, Sec. 64, et seq.)*.

No special consideration need be singled out or apportioned for each separate provision in the contract and a number of agreements covering more than one subject may be founded on one consideration. *Lee v. Lee, 275 S. W. 2d*

574, d.w.j.; Farmers State Bank of Mineola v. Mincher, 290 S. W. 1090, 1091, Tex. Comm. App.

An inspection of the various provisions and paragraphs of the contract of August 10, 1949, discloses adequate consideration to support all of the undertakings and obligations imposed on all parties by the terms thereof. Hence there is no lack of mutuality. *Pace v. Jackson, 284 S. W. 2d 340, Tex. Sup. Ct.; Texas Farm Bureau Cotton Assn. v. Storall, 113 Tex. 273, 253 S. W. 1101; Portland Gasoline Co. v. Superior Marketing Co., 150 Tex. 533, 243 S. W. 2d 823.*

Furthermore, the contract of August 10, 1949, was ratified and re-affirmed on December 1, 1949, by the City of El Paso by entry into the written contract bearing that date between itself, Respondent District, the United States of America, and others, as shown by Plaintiffs' Exhibit No. 33, R. I, 528, wherein it was provided in Paragraph V thereof that "said contract executed on the aforesaid 10th day of August, 1949, became effective as of the 23rd day of September, 1949, and now stands a valid and binding contract between the said City of El Paso, Applicant herein, and the said El Paso County Water Improvement District No. One, and said contract is now in full force and effect."

It would be impossible to more clearly express a stronger ratification and affirmation of a pre-existing agreement, but to make the thing doubly clear the City again in writing dated the 22nd day of June, 1950 (Plaintiffs' Exhibit No.

34, R. I, 536), agreed that the permit from the State Board of Water Engineers was subject to the contract of August 10, 1949, which was still in effect.

With a showing such as this we submit that the only thing which the Court of Appeals could rightly do was to do what it did do: Hold all of the contracts valid and adjudge the rights of the parties in accordance therewith.

But as Petitioner has sought to present to the Court various matters separately, we now discuss them as follows:

I

(In support of an affirmative answer to our Question I, *supra*, pages 2-3, and in reply to Question No. 1, Petition 3, and to Reasons For Granting Writ of Certiorari, Petition 13, and Argument Thereunder, Petition, 14-20.)

It is thought that none of the reasons advanced in the Petition, page 13, as to why the writ of certiorari should issue in this case are supportable. Two of them are on grounds of conflicting decisions. It is understood that for a higher court to review the decision of a lower appellate court on the ground that it is in conflict with prior decisions of its own or other courts of equal or higher standing the Petitioner must show that there is a well defined conflict upon a question of law upon the *same* state of facts, and such that one decision *would overrule the other* if both were rendered by the same court.[12]

[12]Garrity v. Rainey, 112 Tex. 369, 374, 247 S. W. 825, 827.

In any event it seems clear that the holding by the Court of Appeals in this case is not in conflict with any of the decisions or statutes cited by Petitioner. As we construe the opinion of the Court of Appeals, it held that it was not necessary to determine where the rights of the parties to the waters of the Rio Grande originated as they had fixed those rights as between themselves by means of the several contracts involved in this litigation. If that construction is not correct, there is still no conflict.

The holding is not contrary to the terms of the Rio Grande Compact of 1938, Art. 7466e-1 of the Revised Civil Statutes of Texas, set out in full as Appendix A herein.

That the Compact did recognize the primary right to the use of the waters of the Rio Grande to be already in the landowners of the Project, and if not, placed it there, seems clear.

The Federal filings of 1906 and 1908 (Plaintiffs' Exhibit 1a, R. I, 80), expressly stated that the proposal was to "construct certain irrigation works, *in connection with the so-called Rio Grande Project.*" The general map shows what was then contemplated as the Project area.

Storage in Elephant Butte Reservoir began in 1915 (Resch, R. I, 661), twenty-three years before the Compact was signed. It is within the judicial notice of this Court, and also shown by the record from the testimony of Raymond A. Hill, engineer advisor to the Texas Rio Grande Compact Commissioner, that the Rio Grande has always

been regarded as two streams, one ending at Fort Quitman, Texas, and the other beginning there (R. II, 1082-1083).

The Rio Grande Project lies above Fort Quitman, Texas, and the Bureau of Reclamation, under the Secretary of the Interior, to whom has been entrusted the management of Federal Reclamation Projects under authority of Congress, has openly and continuously since 1915 so operated the river for the primary use of the land owners of the Project that it could not fail to be common knowledge that such method was claimed and used as of right. In fact this was never questioned until the Hervey Administration of the City of El Paso did so in 1951.

Between 1934 and 1938 the Government, with the co-operation of Mexico, shortened the river between El Paso and Fort Quitman from 115 miles to 85 miles by straightening its meanders and confining it to a canal between parallel levees (Plaintiffs' Exhibit 112, R. II, 767-780, and testimony of J. F. Friedken, R. II, 781).

All of this was necessarily known to and understood by the commissioners for the three states, together with their attorneys and engineer advisors who prepared the Compact many years after the pattern of use had been established.

In fact the record shows that Raymond A. Hill, who was the engineer advisor to the Rio Grande Compact Commissioner for Texas throughout the negotiations leading up to the signing of the Compact in 1938, had knowledge of the river going back to 1913 when the foundations for Elephant Butte Dam were opened and they were just beginning to

pour concrete. This knowledge increased in detail as the years passed until in 1936 he was retained to assist the State of Texas and the two water districts composing the Rio Grande Project in the first suit by the State of Texas against the State of New Mexico in the Supreme Court of the United States involving the waters of the Rio Grande. The Compact as written embraces almost verbatim the reports submitted to the Commissioners by the engineer advisors (Hill, R. II, 1080-1083), and itself reflects that it was written to fit the situation which had already been created by the Rio Grande Project.

For example, Article XV of the Compact reads as follows:

> "*The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby*, and to the development thereof, have actuated this Compact and none of the signatory states admits that any provisions herein contained establishes any general principle or precedent applicable to other interstate streams." (Emphasis added.)

When the Project was determined to be feasible by the Secretary of the Interior in the exercise of the discretion vested in him by the Reclamation Act its area embraced those lands in New Mexico and Texas for which it was thought there could be furnished a safe water supply by the construction of the facilities then under consideration. The City of El Paso was never a part of this Project (R. I, 694).

Sheet 1, A5, of drawings filed by the United States in the office of the New Mexico Territorial Engineer, Feb-

ruary 2, 1910, being the General Map, which is part of Plaintiffs' Exhibit 1a, sent up as an original exhibit, contains the following:

> "Proposed Engle Reservoir, 185 feet deep at dam, and 40 miles long. Elephant Butte dam 265 feet high, requiring 410,000 cubic yards of rubble concrete. Capacity of reservoir 2,500,000 acre feet. *Average annual discharge of river estimated 800,000 acre feet. Will irrigate 180,000 acres in New Mexico and Texas. Mexico is to be furnished with 60,000 acre feet of water per annum at El Paso* by treaty of May 21, 1906. *Separate diversion dams and canal systems to be constructed for Palomas, Rincon, Mesilla and El Paso Valleys.*"

The preamble of the Compact recites that it is to remove all causes of present and future controversy "with respect to the use of the waters of the Rio Grande *above Fort Quitman, Texas* * * *."

Among the definitions of Article I thereof are the following:

> "(c) The term 'Rio Grande Basin' means all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas *above Fort Quitman* * * *.
>
> "(k) *'Project Storage'* is the combined capacity of *Elephant Butte Reservoir* and all other reservoirs actually available for the storage of usable water below Elephant Butte and *above the first diversion to lands of the Rio Grande Project* * * *.
>
> "(l) 'Usable Water' is all water, exclusive of credit water which is in *project storage* and which is available for release *in accordance with irrigation demands, including deliveries to Mexico.*

"(m) 'Credit Water' is that amount of water in *project storage* which is equal to the accrued credit of Colorado or New Mexico or both.

"(n) 'Unfilled Capacity' is the difference between the total physical capacity of *project storage* and the amount of usable water then in storage.

"(o) 'Actual Release' is the amount of usable water released from the *lowest reservoir comprising project storage.*

"(p) 'Actual Spill' is all water which is actually spilled from *Elephant Butte Reservoir*, or is released therefrom for flood control, in excess of current demand on project storage * * *.

"(q) 'Hypothetical Spill' is the time in any year at which usable water would have spilled from *project storage* if *seven hundred and ninety thousand (790,000)* acre feet had been released therefrom at rates proportional to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs; in computing hypothetical spill the initial condition shall be the amount of usable water in *project storage* at the beginning of the calendar year following the effective date of this Compact, and thereafter the initial condition shall be the amount of usable water in *project storage* at the beginning of the calendar year following each actual spill."

In Article VII provision is made for adjustments with reference to increase of storage by New Mexico, when "actual releases of usable water from the beginning of the calendar year following the effective date of this Compact * * * *have aggregated more than an average of seven hundred and ninety thousand (790,000) acre feet per annum* * * *,*" while in Article VIII arrangement is made concerning releases by New Mexico "to the end that a *normal*

release of seven hundred and ninety thousand (790,000) acre feet may be made from project storage in that year."

Thus, while the Compact did not undertake to provide Texas with 790,000 acre feet of water per year, that quantity was regarded as a "normal release" to be made by those engaged in the physical operation of the river, and as a practical matter covers the 800,000 acre feet estimated by the Government in 1910 as the total annual flow of the Rio Grande at Elephant Butte Dam to take care of the estimated 180,000 acres of land in the Rio Grande Project in New Mexico and Texas, and when Mexico's 60,000 acre feet per year under the treaty of 1906 is deducted from the "normal release" of 790,000 acre feet the result is 70,000 acre feet less than the requirement for the Project as estimated by the Government 28 years before the Compact was signed.

From the language of the Compact quoted above the conclusion is irresistible that it was drafted to fit the pattern of the Rio Grande Project so that what water Texas did get pursuant to the agreement was to be subjected first to the needs and requirements of the landowners of the Project; with other uses secondary thereto and dependent upon whether in any given year there was water available in excess of Project requirements.

As was found by the trial judge in his opinion (R. III, 1682), "The Compact, instead of leaving the Texas share of the water open for disposition under the general water statutes of Texas, plainly directs same for irrigation in the Project."

Neither is the decision of the Court of Appeals in conflict with section 8 of the Reclamation Act. At all times since this case was first initiated in the District Court the Petitioner in discussing this Act has failed to quote this section in its entirety, apparently proceeding on the idea that if the omitted part be ignored by it long enough it will disappear.

The Act of June 17, 1902, was passed by the Fifty-Seventh Congress as Chap. 1093, and is set out as *32 Stat. 388 to 390.*[1] When it was carried into the United States Code it was broken up and distributed in various places in the Code. The only portion of section 8 in which Petitioner has ever shown any interest is that part of it which is codified as *Title 43, U. S. C., Section 383.* Section 8, however, in its entirety, reads as follows:

> "Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or in any way to interfere with the laws of any State or Territory relating to the Control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." *(32 Stat. 388, 390.)*

[1] Appendix B.

Particular attention is invited to the fact that the section consists of one sentence, the first part of which provides that it shall not affect state laws and that the Secretary shall proceed in conformity therewith, but the last clause says: "*Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.*"

That proviso was separately codified as *Section 372 of Title 43, U. S. Code.*

As a principle of statutory construction, the natural and appropriate office of a proviso is to restrain or qualify some preceding matter,[4] and in *MacEvoy v. United States, 322 U. S. 102, 107, 88 L. Ed. 1163, 1167,* the Supreme Court said: "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment * * *. Specific terms prevail over the general in the same or another statute which might otherwise be controlling'."

Consequently, the meaning of Section 8 of the Act as applied to the matter under consideration is the same as if it had been written:

> "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right, regardless of

[4] Cox v. Hart, 260 U. S. 426, 435, 67 L. Ed. 332, 337; American Air Lines v. Civil Aeronautics Board, 178 F. 2d 903, 906, Par. 1, C. A. 7; Sutton v. U. S., 157 F. 2d 661, 666, Par. 15, C. A. 5.

what the state law may be as to this (but as to other matters relating to irrigation, State law shall control)."

The Government in the exercise of its sovereignty through Congress has the power to do this, and did do this, by force of Article I, Section 8, Clause 1, of the Constitution,[15] as was recently held by the Supreme Court in *United States v. Gerlach Livestock Co., 339 U. S. 725, 738, 94 L. Ed. 1231, 1242*, wherein Mr. Justice Jackson for the court said:

> "Thus the power of Congress to promote the general welfare through large scale projects for reclamation, irrigation or other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretations of the power over navigation."

In *Ickes v. Fox, 300 U. S. 82, 95; 81 L. Ed. 525, 530*, it was said by the Supreme Court relative to an appropriation made by the United States under the Reclamation Act:

> "Appropriation was made *not for the use of government*, but under the Reclamation Act, for the use of landowners; *and by the terms of the law* and of the contract already referred to, *the water rights became the property of the landowners*, wholly distinct from the property right of the government in the irrigation works. * * * The Government was and remained simply a carrier and distributor of the water * * * with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works." (Emphasis added.)

[15] "The Congress shall have the power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general welfare of the United States." (Constitution, Art. I, Sec. 8, Cl. 1.)

The above language is included in a quotation cited with approval in the later case of *Nebraska v. Wyoming, 325 U. S. 589, 614, 89 L. Ed. 1815, 1829.*

Between 1906 and 1938, the date of the signing of the Rio Grande Compact between Colorado, New Mexico and Texas, the Federal Government spent literally millions of dollars in the construction of Rio Grande Project facilities on the basis of future repayment by the owners of lands which made the Project feasible. What the trial judge indicated (R. III, 1683) to be the reasonable belief of the United States with reference to the result of the Rio Grande Compact, executed thirty years after the Federal Filings of 1906 and 1908, applies with equal force here:

> "* * * the United States never supposed that its physical works and facilities were to be put in service to handle that part of the water destined for Texas, only to have the Project lands deprived of it in favor of other uses under the law of Texas, thus, perhaps, imperiling the repayment program between the Project and the United States."

It is not to be supposed that Congress intended for such result to be possible, but on the other hand it is proper to conclude that the very reason why the proviso was put into Section 8 of the Reclamation Act making the water rights appurtenant to the land was to make it impossible for the repayment program to be imperiled by state law in favor of other uses.

Certainly the decision of the Court of Appeals in this case is not in conflict in any way with the cases of *Nebraska v. Wyoming, 325 U. S. 589, 89 L. Ed. 1815; Nebraska v.*

Wyoming, 295 U. S. 40, 79 L. Ed. 1289; Ickes v. Fox, 300 U. S. 82, 81 L. Ed. 525, or *Hudspeth County Conservation & Reclamation District No. 1 v. Robbins, 213 F. 2d 425,* because in none of those cases was there any issue raised as to the applicability of the provisio in Section 8 of the Reclamation Act, and it was not even discussed.

The *Ickes-Fox* case and the last *Nebraska-Wyoming* case held that where the Government appropriated water under state law for use of Reclamation Project users the Government itself did not become the owner of the water rights but the landowners *did*, and this was recognized to be true by the Fifth Court of Appeals in the *Hudspeth-Robbins* case, where what the court held was that the case must be dismissed on account of the absence of the United States, an indispensable party.

Respondents in this case have never claimed that the United States owned the water rights but to the contrary, in keeping with the above authorities, have at all times herein affirmatively insisted that the water rights were appurtenant to the land irrigated as required by the proviso in Section 8 of the Act. The decision below, instead of being to the contrary, is in conformity therewith.

II

(In support of an affirmative answer to our Question II, *supra*, page 3, and in reply to Question No. 2, Petition 4, and argument thereunder, Petition 20-23.)

In holding that the City of El Paso could not take pay-free from the bed of the Rio Grande located in the City of

El Paso a quantity of water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande, the Court of Appeals did not decide any state question, important or otherwise, in conflict with state law. The state court decisions cited by Petitioner on pages 20 and 21 of the petition in the first place did not involve the attempted exchange of sewage for fresh water; did not involve the attempted exchange of sewage for water which had been impounded at great expense and released from storage under Government control, and finally, in neither of those cases was there a contract, fixing the party's rights, as there was here.

The City has been voluntarily dumping its sewage effluent into the Rio Grande for more than forty years as a means of getting rid of it. (Testimony of Everett J. Brandt, R. III, 1590-1592.)

The annual discharge of sewage into the river for the last ten years has varied from a minimum of 10,412 acre feet in 1948 to 13,308 acre feet in 1953 (Defendant's Exhibit 20, R. II, 1154). As a matter of fact, with the stuff discharged into the river, the nuisance got so bad that J. T. Tillman, the Sanitary Engineer, in behalf of the City on September 29, 1953, wrote a letter to "Mr. W. F. Resch, Manager U. S. Reclamation Service" (Plaintiffs' Exhibit 100, R. I, 731), about "the terrible sewage odors coming from the Rio Grande River," and asking him to turn more water into the river in order to ameliorate the stench.

Even in the absence of contract the city would have no right to take fresh water from the stream in exchange for sewage outfall which it had voluntarily abandoned as a means of getting rid of it, for in *Nebraska v. Wyoming, 325 U. S. 589, 637, 89 L. Ed. 1815, 1841-1842,* this Court said:

> "We think it goes too far to say that when the return flows are *abandoned*, they may nevertheless be exchanged for upstream diversions by the same amount. When the return flows are *abandoned*, they become subject to appropriations downstream. See 2 Kenny, Irrigation & Water Rights, 2d ed., Par. 1114. They no longer remain subject to control for further use in the project. *Any claim to them or their equivalent under the form of an 'in lieu of' diversion is lost.*" (Emphasis added.)

But in the present case there is a contract dated August 10, 1949, between the defendant City of El Paso and plaintiff El Paso County Water Improvement District No. 1 (Plaintiffs' Exhibit No. 32, R. I, 509), which, we believe, settles the question.

Among the provisions of the contract are the following:

> "Whereas, there has been appropriated under the laws of New Mexico and Texas for and on behalf of the Rio Grande Federal Irrigation Project in New Mexico and Texas, comprising lands of the District and the Elephant Butte Irrigation District * * * and *the District claims all such appropriations cover all of the appropriatable waters of the Rio Grande River for the irrigation of lands in said districts;* and
>
> "Whereas, in normal operation of the Rio Grande Project there are intermittent flows of water in the Rio Grande River in the vicinity of the City in excess of the requirements of the District and the Hudspeth

District, resulting from Project developed drainage and return flow during periods of non-irrigation use, storm run-off, and unavoidable Project operating wastes due to sudden climatic changes occurring intermittently throughout the year, * * *; and

"Whereas, the *City has urged a claim in equity against the Rio Grande Project for sewage effluent placed in the Rio Grande River* from the City's operation of its sewage and water systems, a considerable amount of which effluent becomes commingled with the waters of the Rio Grande River and is available for use and is used by lands of the District for irrigation purposes; and

"Whereas, *it is the desire of the District and the City to cooperate to the end of avoiding controversy and litigation between themselves and to settle and compromise their respective claims* involving relative rights and priorities of use of the waters hereinabove referred to for domestic and irrigation purposes,

"Now, therefore, it is agreed:

"1. The District, subject to approval hereof by the Secretary of the Interior of the United States, will permit use by the City of Rio Grande Project works serving the District lands, for the purpose of this agreement, * * * *all as determined by the Project Manager of the Rio Grande Project.* * *."

(Paragraph 2 gives the city the right, under stated conditions, to take from the river water in excess of Project needs.)

* * * * *

(Paragraph 7 sets out the amounts which the City promises to pay for the use of Project facilities.)

* * * * *

"10. The City is now discharging and may in the future discharge into the Rio Grande sewage effluent

resulting from the use of water for municipal, industrial and domestic purposes obtained from sources other than the project water supply. It is expressly understood that in executing this contract, or in accepting the benefits thereof, *the City shall not be held to have in anywise relinquished, modified or impaired its title to, ownership of, and its right to control and determine the use and disposition of such effluent prior to its discharge into the Rio Grande. It is further understood that after such effluent is discharged into the Rio Grande it constitutes part of the Project water supply.*" (Emphasis added.)

The City avers on page 22 of its Petition that "* * * certainly every known principle of equity would, as held by the Trial Judge, give the City this right of exchange. Especially is this true when the very life of the City depends on getting water from the Rio Grande to supplement its water well supply."

We can only classify that as an exceptionally extravagant statement improvidently made, because in the record in this case it is shown by the City's own assertions that in the area of land adjacent to the City of El Paso for which it recently paid $714,145.35 for a brand new source of supply for water there is "At least 4 to 5 million acre feet of fresh water in the sands and gravel beneath the Mesa in Texas. It will be economically feasible to withdraw more than one half of this through wells. Recharge to the ground water reservoir is estimated by the Geological Survey to be at the rate of about 15 million gallons per day. Most of this can be intercepted by wells. *At least 25 to 30*

million gallons of fresh water per day, therefore, can be pumped from ground water reservoirs for a period of 100 years." (R. II, 1190-1191.)

Even if this were not the case, it is well recognized in Texas that the court may not consider the question of whether a contract made by a city's governing body is beneficial to the city, or should have been made at all. *Gillam v. City of Ft. Worth, 287 S. W. 2d 494, 499, Par. 11; Charles Scribners Sons v. Marrs, 114 Tex. 11, 262 S. W. 722, 728, Par. 12.*

In the present case the Court of Appeals held that the contract of August 10, 1949, is valid and prevents the City from exchanging sewage for fresh water, and that holding is in no way in conflict with state law.

III

(In support of an affirmative answer to our Question III, *supra*, pages 3-4, and in reply to Questions 3 and 4, Petition 4, and argument thereunder, Petition 23-27.)

In holding that the word "Maintain", as used in the ordinance of the City of El Paso, dated November 9, 1939, and the quitclaim deed from Petitioner to Respondent United States of America did not make Respondent District secondarily liable for the tearing out of existing bridges which had been kept in good state of repair by the Federal Government and the replacement of same by structures of entirely different design, the Court of Appeals in this case is not in conflict with United States Court of Appeals for

the Sixth Circuit, nor with any other Federal Court decision which has been cited by Petitioner nor with the law of Texas as established by the decisions of Texas appellate courts.

The case of *Tennessee Elec. Co. v. White County, 52 F. 2d 1065*, went up from Tennessee to begin with, and in addition to that the facts are not comparable anyway. There, the power company proposed to *erect and maintain* bridges at specified places, and agreed to bear the "cost of continued maintenance" thereof.

The bridges were washed out by flood.

The situation in the present case is entirely different. Petitioner wanted to tear out existing bridges which admittedly were in good repair and replace them with entirely new structures of different basic design, which was something certainly not within the contemplation of the parties when the City executed the deed in question, appearing in the record as Plaintiffs' Exhibit No. 18, R. I. 245.

This deed quitclaims to the Government all "right, title and interest" in all parts of described streets and alleys and provides that "this conveyance is subject to the condition that the United States shall be obligated to maintain the said bridges at said described crossings, contingent, however, upon appropriations being made therefor by Congress; and there is further reserved to the said City of El Paso the right to *construct* and *maintain* at its own cost such additional bridges and other structures across

said canal other than those hereinabove designated as it may deem necessary. (Emphasis ours.)

Of course, Texas law alone governs the construction, and determines the validity and effect of any written instrument disposing of Texas realty. *Russell v. Ely, 2 Black (67 U. S.) 575, 578; Chidester v. City of Newark, 162 F. 2d 598, C. C. A. 3; Saltmount Oil Corp. v. Imperial Crown Royalty Corp., 90 S. W. 2d 418, 423, d. w. j. (Tex. Civ. Apps.)*

The citizens of this state customarily use words with the meaning attributed to them by a standard dictionary, and the courts of Texas do the same thing.

For example, the Texas Court of Civil Appeals at El Paso, in the case of *Malone v. El Paso County Water Improvement District No. 1, 20 S. W. 2d 815, 820*, wherein the State Supreme Court refused a writ of error, said:

> "The term 'maintain' in *Webster's International Dictionary, which has become, in effect, a law book* on questions, is defined to mean 'to hold or keep in any particular state or condition'; 'to support'; 'to sustain'; 'to uphold'; 'to keep up'; 'to keep possession of'; 'not to surrender'; 'to bear the expense of'." (Emphasis added.)

Several years earlier the Texas Court of Civil Appeals at Dallas had quoted this definition of the word "maintain" from the same dictionary, with respect to which it said in *St. Louis S. W. Ry. Co. of Texas v. Davy Burnt Clay*

Ballast Co., 273 S. W. 630, 633 (reversed on other grounds, 285 S. W. 295):

> "We can well accept this definition as our guide, for, as said in the case of Brenn v. City of Troy, 60 Barb. (N. Y.) 417, 421:
>
> "' '*Websters* (International) *Dictionary* * * * *has become in effect a law book on questions of construction*'." (Emphasis added.)

The language of a deed is the language of the grantor, and any doubt as to its construction is to be resolved against him in favor of the grantee. *Curdy v. Stafford, 88 Tex. 120, 30 S. W. 551, 552.*[16]

The words used in the instrument are to be taken in their common acception, rather than in a technical sense.[17] Every word in a deed, if possible, should have its proper effect and the meaning of one word or phrase may be ascertained by comparing it with other words or phrases in the same instrument. *Soulsberry v. Maddix, 125 F. 2d 430, 434, Par. 14, cert. den. M. r. S., 317 U. S. 643.*

Applying these principles to the instrument under consideration, we think we can say with confidence that the grantee in the deed and the Board of Directors of the plaintiff District, when they undertook by resolution to

[16] Clayborn v. Gambill, 87 S. W. 2d 508, 510, wr. ref.; Rettig v. Houston West End Realty Co., 254 S. W. 765, 768, Tex. Sup.; Gravis v. Rogers, 214 S. W. 2d 886, 889, Par. 9, wr. ref.; Davis v. Field, 222 S. W. 2d 697, 699, wr. ref. n. r. e.; Young v. Rudd, 226 S. W. 2d 469, 473, Par. 5, wr. ref. n. r. e.; Humble Oil & Ref. Co. v. Harrison, 146 Tex. 216, 205 S. W. 2d 355, 360.

[17] Also Pitts v. Camp County, 120 Tex. 558, 39 S. W. 2d 608, 615-616; Davis v. Texas Co., 222 S. W. 549, 554, Par. 6, reversed on other grounds, 114 Tex. 92, 254 S. W. 304; Watkins v. Certain-Teed Products Corp., 231 S. W. 2d 981, 984, Par. 4.

bind the District to furnish funds to "maintain" the bridges when and if the government didn't do so, would have sustained a major shock if someone had told them that fifteen years later the grantor would urge that the word included the obligation to tear out thirty-one bridges in a good state of repair and rebuild them with new and different structures at a total ultimate cost of about six hundred thousand dollars.

The word "maintain" in its common acceptance simply does not mean anything like that. The distinction between construction and maintenance was recognized by the City of El Paso in the deed itself when it reserved the right to *construct* and *maintain*, at its own cost, additional bridges across the canal at other points. If the word "maintain" includes the word "construct," as the City now contends, then use of both words should not have been made.

The City was accustomed to these words in their proper sense. In an ordinance dated December 11, 1913 (D. 2, R. II, 855), there was a proviso that the government was to *construct*, erect and *maintain* nine bridges, and *erect* and *maintain* and *replace* all bridges east of Cotton Avenue.

It is significant that in the ordinance of September 5, 1939, as amended November 9, 1939 (Plaintiffs' Exhibits Nos. 16 and 17, R. I, 235 and 239), no words *which* in their ordinary meaning comprehend the idea of new or different construction were used. As shown by the quitclaim deed itself, the United States had already performed the obli-

gation imposed on it by the ordinance of December 11, 1913, for this deed enumerates and locates thirty-one bridges crossing the canal "heretofore constructed by the Bureau of Reclamation of the United States" (R. I. 247). Once to construct 31 bridges without expense to the City would seem to be enough, and for the Government to keep those 31 bridges in repair without having to tear them out, though in sound condition, and replace them with entirely new bridges of a different structural design would appear to be what the parties reasonably contemplated on November 9, 1939. This the Government has done.

Upon whom would rest the burden of constructing completely new bridges of entirely different design, whenever the City should consider them desirable, at any of the locations of the 31 bridges which the grantee was to "maintain" was something which the contract simply did not cover.

The facts relating to the deed in question here bear no resemblance to those of any case with which Petitioner claims a conflict exists.

Repeatedly it has been held by Texas courts and others that the word "maintain" excludes the cost of new structures and does not mean to provide or construct, but to keep up and preserve. *Madeley v. Trustees of Conroe Independent School District*, 130 S. W. 2d 929, 933 (Tex. Civ. Apps., Beaumont); *Love v. Rockwall Independent School District*, 194 S. W. 659, 661, wr. ref. (Tex. Civ. Apps., Dallas); *Malone v. El Paso County Water Improve-*

ment District No. 1, 20 S. W. 2d 815, 820, wr. ref.; L. & N. Ry. v. Godman, 4 N. E. 163, Ind.; Barber Asphalt Paving Co. v. Hezel, 56 S. W. 449 (Mo.); State v. Wilder, 98 S. W. 465, 467 (Mo.); Huffman v. State Roads Comm., 137 Atl. 358, 364, 152 Md. 566; Kaderly v. Multnomah County Court, 52 Pac. 515, 516, 32 Oreg. 560.

The holding of the Court of Appeals in this case is unquestionably not only not contrary to the decisions of the appellate courts of Texas, but in conformity therewith.

Wholly aside from and in addition to all of the above, there is another reason entirely sufficient in itself as to why the word "maintain" in the quitclaim deed should not be construed to include the obligation on the part of the Respondent District to provide new bridges as a matter of secondary liability. The Court of Appeals thought the true meaning of the word was so clear that it was not necessary to consider this additional reason, so we now present it:

The only manner in which any sort of secondary liability on the part of the plaintiff El Paso County Water Improvement District No. 1 could exist arises from the action of its Board of Directors on November 9, 1939, in passing a resolution whereby "it obligated itself to the City of El Paso to furnish funds for the maintenance of bridges at points specifically enumerated in said city ordinance of September 5, 1939, and in the deed of November 9, 1939, made in pursuance thereof, whenever such funds are not appropriated by Congress or furnished by the Federal

Government or its agencies," as pleaded by plaintiffs in Paragraph X of the Amended Complaint (R. I, 23).

If that resolution, under all of the circumstances of this case, resulted in a contract between the City of El Paso and the plaintiff District, then in construing that contract it must be held that the obligation to furnish funds to "maintain" the bridges when the Government fails to do so excludes the obligation to furnish funds for the erection of new structures and is limited to the obligation of furnishing funds for the repairing, keeping up and preserving only those specifically designated bridges, because while the Board of Directors had the power to obligate the District for ordinary current expenses to be satisfied out of current revenues, it was powerless to obligate it for any debt of the kind and character insisted upon by defendant City.

It was long ago said by the Supreme Court of this state that "Parties to a contract are presumed to intend that it shall be enforced. It is not to be presumed that they deliberately executed an agreement, knowing that it was invalid." *Ryan & Co. v. M. K. & T. R. Co., 65 Tex. 13, 16.*

Further, it is the unquestionable rule in both federal and state courts that if a contract is susceptible of two constructions, one of which will render it valid and the other invalid, construction validating it must prevail. *Great Northern Railroad Co. v. Delmar Co., 283 U. S. 686, 691, 75 L. Ed. 1349, 1353; Wood Motor Co. v. Nebel, 150 Tex. 86, 238 S. W. 2d 181, 183, Par. 1.*

If the word "maintain" in the contract under consideration be construed to include the cost of new erections, then the contract is void and the District is under no obligation at all because in violation of subsection (c) of Section 59 of Article 16 of the Constitution of the State of Texas, which is set out in full as Appendix H. This empowers the Legislature to "authorize all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment," but restrict this power by adding the following proviso as the last clause:

> "provided the Legislature shall not authorize the issuance of any bonds *or provide for any indebtedness* against any reclamation district *unless such proposition shall first be submitted to the qualified property tax-paying voters of such district and the proposition adopted.*" (Emphasis added.)

The Supreme Court of Texas has laid down the rule that the word "debt" as used in a similar section of the Constitution means any pecuniary obligation imposed by contract except such as was at the time of agreement, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year or out of some fund then within the immediate control of the particular political subdivision of the state making the agreement. If the item does not arise as an item of ordinary expenditure in the daily functioning of the agency or if it is not to be paid out of funds then in the treasury legally applicable thereto, it is a debt condemned by the Constitution unless provision for its payment is made at the time

the obligation is incurred. *T. & N. O. R. Co. v. Galveston County, 141 Tex. 34, 169 S. W. 2d 713, 715, Par. 3; McNeal v. City of Waco, 89 Tex. 83, 33 S. W. 322; Stevenson v. Blake, 131 Tex. 103, 113 S. W. 2d 525, 527, Par. 1.* Hence, a contract indemnifying against future loss, without simultaneous provisions for raising revenue to pay it, is void, as was held in *T. & N. O. R. Co. v. Galveston County*, supra.

Respondent District was absolutely powerless to make a valid contract with the City or anyone else to "maintain" the bridges, in the sense of rebuilding them, without prior vote of its property owners, is definitely established by the following decisions of Texas' highest court and the Federal Fifth Court of Appeals: *Austin Mill & Grain Co. v. Brown County Wtr. Imp. Dist. No. 1, 128 S. W. 2d 829, affirmed 135 Tex. 140, 138 S. W. 2d 523; Texas Agricultural Association of Edinburgh v. Hildago County Water Control & Improvement District No. 1, 125 F. 2d 829, Par. 6, C. C. A. 5, cert. den. 317 U. S. 643, 87 L. Ed. 518; Texas & New Orleans Railway Company v. Galveston County, 141 Tex. 34, 169 S. W. 2d 713.*

Respondent District didn't own the bridges. They were and are owned by the United States of America under deed from the Franklin Irrigation Co., dated October 14, 1912, Plaintiffs' Exhibit 14 (R. I, 214), and quitclaim deed from the City of El Paso, dated November 9, 1939, Plaintiffs' Exhibit 18 (R. I, 245). If there was a resolution of the District's Board of Directors, the existence of which defendant denied, and it should be construed under the

circumstances as a contract with the City, it could be at most a contract of indemnity, and contingent at that.

The Court of Appeals' decision was, therefore, in conformity with Texas law rather than in conflict with it.

IV

(In support of affirmative answer to our Question IV, page 4, *supra*, and in reply to Question No. 5, Petition, 4, and argument thereunder, Petition, 28-30.)

The Court of Appeals correctly decided that the ordinance and quitclaim deed of November 9, 1939, whereby the City conveyed to the United States its interest, if any, in the Franklin Canal, a Rio Grande Federal Reclamation Project facility, are valid.

There are other good answers to Petitioner's contention that they are void, but the shortest one is that the Texas Court of Civil Appeals at El Paso, in the case of *City of El Paso v. Mendoza, 191 S. W. 2d 102, 105*, has already held that this same deed now under consideration is valid. The ordinance was merely a step preliminary to the deed. The Supreme Court of Texas refused the City's application for writ of error in that case for want of merit. As we understand it, that decision is binding on the Federal Courts.

As a matter of fact, Petitioner, in the trial court in that case, not only judicially admitted that this same deed to the United States was valid but actually urged it as a

defense to the liability asserted against it therein, as shown here by Plaintiffs' Ex. 19, R. I, 250-298, which is a certified copy of the trial court proceedings in that case.

V

Beginning with that paragraph marked V on page 30, and extending to its conclusion, the Petition seems to be in a state of confusion out of which we have not been able to bring order, but we gather that the intent is made to present the proposition that the Court of Appeals' affirmance of the trial court's action of enjoining the City of El Paso and those acting for it from taking water from the bed of the Rio Grande or from the Franklin Canal except in the manner and in accordance with the rights of the City as fixed by the decree constitutes a ruling of which this Court should take serious notice. We cannot think so.

It was proven by Respondents on the trial of the case that the City of El Paso under the leadership of its Mayor Fred Hervey had assumed to take the law into its own hands and withdraw water from the Rio Grande and the Franklin Canal at its own pleasure in unlimited amounts in violation of its solemn contracts previously executed, which it, for itself, adjudged to be void.

For instance, His Honor, Mayor Fred Hervey, testified by deposition:

> "Question: I call your attention to Request No. 63, 'During the year 1953, the City of El Paso withdrew from the Franklin Canal or the Rio Grande in excess of the amount of water which the City of El Paso was entitled to take by reason of its ownership of first-

class water right lands within the Rio Grande Federal Reclamation Project, and persisted in such excess withdrawals after it had been notified of its overdraft by the Rio Grande Project Superintendent.' You have denied that. On what basis?

"Answer: Well, again, we do not recognize the Rio Grande Project, or the Federal Reclamation Project, I should say. (R. I., 567.)

"And the water we took out of the Rio Grande river was, in our opinion, not owned by the El Paso Water Improvement District No. 1.

* * * * *

"No. Any water we took out of the Rio Grande was not 'by reason of its ownership of first class water right lands.'

"Question: What was it by reason of?

"Answer: It was by reason that there was water running down the Rio Grande and that the Texas Board of Water Engineers had allocated 27,000 acre feet to the City of El Paso.

"Question: You are just brushing all these contracts aside; the contracts of February 18, 1941; December 1, 1944; August 10, 1949; and June 22, 1950, I think it is; all of those as far as you are concerned are just scraps of paper?

"Answer: No, they are all illegal." (R. I., 568.)

And in answer to the first question, R. I, 569:

"We took water out of the Rio Grande that we were justly entitled to from the effluent that we were putting into the river and the amount of water allocated to us by the Texas Board of Water Engineers. We just took water—we didn't take it by reason of anything—we just took water, period, that belonged to us."

There is much more in the record concerning the City's arrogant action but the above is a fair sample.

To prevent conduct such as this is what injunctions are for. Citation of authorities seem unnecessary.

CONCLUSION

It is respectfully submitted that the action of the Court of Appeals for the Fifth Circuit with reference to each matter presented by the Petition, is clearly correct; that it is in no way in conflict with either Federal or State decisions; and did not determine any question, theretofore undetermined, of importance sufficient to warrant review by this Court.

Respectfully submitted,

Eugene T. Edwards

EUGENE T. EDWARDS,
11th Floor Bassett Tower,
El Paso, Texas,
Counsel for all Respondents except the United States of America.

LOUIS A. SCOTT,
1100 First National Building,
El Paso, Texas,
Of Counsel.

APPENDIX A

Revised Civil Statutes of Texas

Art. 7466e-1. Rio Grande Compact of 1938

Section 1. The Rio Grande Compact entered into and signed at Santa Fe, New Mexico, on March 18, 1938, by M. C. Hinderlider, Commissioner for the State of Colorado, Thos. M. McClure, Commissioner for the State of New Mexico, and Frank B. Clayton, Commissioner for the State of Texas, and approved by S. O. Harper, Commissioner representing the United States of America, an original copy of which has been deposited in the office of the Secretary of State for the State of Texas, is hereby, in all respects, ratified and confirmed; said Compact being as follows:

RIO GRANDE COMPACT

The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quit man, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable appointment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective Commissioners:

For the State of Colorado—M. C. Hinderlider
For the State of New Mexico—Thomas M. McClure
For the State of Texas—Frank B. Clayton

who after negotiations participated in by S. O. Harper, appointed by the President as the representative of the United States of America, have agreed upon the following Articles, to-wit:

ARTICLE I

(a) The State of Colorado, the State of New Mexico, the State of Texas, and the United States of America, are hereinafter designated "Colorado," "New Mexico," "Texas," and the "United States," respectively.

(b) "The Commission" means the agency created by this Compact for the administration thereof.

(c) The term "Rio Grande Basin" means all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman, including the Closed Basin in Colorado.

(d) The "Closed Basin" means that part of the Rio Grande Basin in Colorado where the streams drain into the San Luis Lakes and adjacent territory, and do not normally contribute to the flow of the Rio Grande.

(e) The term "tributary" means any stream which naturally contributes to the flow of the Rio Grande.

(f) "Transmountain Diversion" is water imported into the drainage basin of the Rio Grande from any stream system outside of the Rio Grande Basin, exclusive of the Closed Basin.

(g) "Annual Debits" are the amounts by which actual deliveries in any calendar year fall below scheduled deliveries.

(h) "Annual Credits" are the amounts by which actual deliveries in any calendar year exceed scheduled deliveries.

(i) "Accrued Debits" are the amounts by which the sum of all annual debits exceeds the sum of all annual credits over any common period of time.

(j) "Accrued Credits" are the amounts by which the sum of all annual credits exceeds the sum of all annual debits over any common period of time.

(k) "Project Storage" is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of two million, six hundred and thirty-eight thousand, eight hundred and sixty (2,638,860) acre-feet.

(l) "Usable Water" is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.

(m) "Credit Water" is that amount of water in project storage which is equal to the accrued credit of Colorado or New Mexico or both.

(n) "Unfilled Capacity" is the difference between the total physical capacity of project storage and the amount of usable water then in storage.

(o) "Actual Release" is the amount of usuable water released in any calendar year from the lowest reservoir comprising project storage.

(p) "Actual Spill" is all water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.

(q) "Hypothetical Spill" is the time in any year at which usable water would have spilled from project storage if seven hundred and ninety thousand (790,000) acre-feet had been released therefrom at rates proportional to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs; in computing hypothetical spill the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following the effective date of this Compact, and thereafter the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following each actual spill.

ARTICLE II

The Commission shall cause to be maintained and operated a stream gaging station equipped with an automatic water stage recorder at each of the following points, to-wit:

(a) On the Rio Grande near Del Norte above the principal points of diversion to the San Luis Valley;

(b) On the Conejos River near Magote;

(c) On the Los Pinos River near Ortiz;

(d) On the San Antonio River at Ortiz;

(e) On the Conejos River at its mouths near Los Sauces;

(f) On the Rio Grande near Lobatos;

(g) On the Rio Chama below El Vado Reservoir;

(h) On the Rio Grande at Otowi Bridge near San Ildefonso;

(i) On the Rio Grande near San Acacia;

(j) On the Rio Grande at San Marcial;

(k) On the Rio Grande below Elephant Butte Reservoir;

(l) On the Rio Grande below Caballo Reservoir.

Similar gaging stations shall be maintained and operated below any other reservoir constructed after 1929, and at such other points as may be necessary for the securing of records required for the carrying out of the Compact; and automatic water stage recorders shall be maintained and operated on each of the reservoirs mentioned, and on all others constructed after 1929.

Such gaging stations shall be equipped, maintained, and operated by the Commission directly or in cooperation with an appropriate Federal or State agency, and the equipment, method and frequency of measurement at such stations shall be such as to secure reliable records at all times.

ARTICLE III

The obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line, measured

at or near Lobatos, in each calendar year, shall be ten thousand (10,000) acre-feet less than the sum of those quantities set forth in the two (2) following tabulations of relationship, which correspond to the quantities at the upper index stations:

Discharge of Conejos River

Quantities in thousands of acre-feet

Conejos Index Supply (1)	*Conejos River at Mouths (2)*
100	6
150	20
200	45
250	75
300	109
350	147
400	188
450	232
500	278
550	326
600	376
650	426
700	476

Intermediate quantities shall be computed by proportional parts.

(1) Conejos Index Supply is the natural flow of Conejos River at the U. S. G. S. gaging station near Mogote during the calendar year, plus the natural flow of Los Pinos River at the U. S. G. S. gaging station near Ortix and the natural flow of the San Antonio River at the U. S. G. S. gaging station at Ortiz, both during the months of April and October, inclusive.

(2) Conejos River at mouths is the combined discharge of branches of this River at the U. S. G. S. gaging stations near Los Sauces during the calendar year.

Discharge of Rio Grande Exclusive of Conejos River

Quantities in thousands of acre-feet

Rio Grande at Del Norte (3)	*Rio Grande at Lobatos less Conejos at Mouths (4)*
200	60
250	65
300	75
350	86
400	98
450	112
500	127
550	144
600	162
650	182
700	204
750	229
800	257
850	292
900	335
950	380
1,000	430
1,100	540
1,200	640
1,300	740
1,400	840

Intermediate quantities shall be computed by proportional parts.

(3) Rio Grande at Del Norte is the recorded flow of the Rio Grande at the U. S. G. S. gaging station near Del Norte during the calendar year (measured above all prin-

cipal points of diversion to San Luis Valley) corrected for the operation of reservoirs constructed after 1937.

(4) Rio Grande at Lobatos less Conejos at mouths is the total flow of the Rio Grande at the U. S. G. S. gaging station near Lobatos, less the discharge of Conejos River at its mouths, during the calendar year.

The application of these schedules shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging station; (b) any new or increased depletion of the runoff above inflow index gaging stations; and (c) any transmountain diversions into the drainage basin of the Rio Grande above Lobatos.

In event any works are constructed after 1937 for the purpose of delivering water into the Rio Grande from the Closed Basin, Colorado shall not be credited with the amount of such water delivered, unless the proportion of sodium ions shall be less than forty-five (45) per cent of the total positive ions in that water when the total dissolved solids in such water exceeds three hundred and fifty (350) parts per million.

ARTICLE IV

The obligation of New Mexico to deliver water in the Rio Grande at San Marcial, during each calendar year, exclusive of the months of July, August, and September, shall be that quantity set forth in the following tabulation

of relationship, which corresponds to the qauntity at the upper index station:

Discharge of Rio Grande at Otowi Bridge at San Marcial
Exclusive of July, August, and September

Quantities in thousands of acre-feet

Otowi Index Supply (5)	*San Marcial Index Supply (6)*
100	0
200	65
300	141
400	219
500	300
600	383
700	469
800	557
900	648
1,000	742
1,100	839
1,200	939
1,300	1,042
1,400	1,148
1,500	1,257
1,600	1,370
1,700	1,489
1,800	1,608
1,900	1,730
2,000	1,856
2,100	1,985
2,200	2,117
2,300	2,253

Intermediate quantities shall be computed by proportional parts.

(5) The Otowi Index Supply is the recorded flow of the Rio Grande at the U. S. G. S. gaging station at Otowi Bridge near San Ildenfonso (formerly station near Buck-

man) during the calendar year, exclusive of the flow during the months of July, August, and September, corrected for the operation of reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and Otowi Bridge.

(6) San Marcial Index Supply is the recorded flow of the Rio Grande at the gaging station at San Marcial during the calendar year exclusive of the flow during the months of July, August, and September.

The application of this schedule shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) depletion after 1929 in New Mexico at any time of the year of the natural runoff at Otowi Bridge; (c) depletion of the runoff during July, August, and September of tributaries between Otowi Bridge and San Marcial, by works constructed after 1937; and (d) any transmountain diversions into the Rio Grande between Lobatos and San Marcial.

Concurrent records shall be kept of the flow of the Rio Grande at San Marcial, near San Acacia, and of the release from Elephant Butte Reservoir, to the end that the records at these three (3) stations may be correlated.

ARTICLE V.

If at any time it should be the unanimous finding and determination of the Commission that because of changed physical conditions, or for any other reason, reliable rec-

ords are not obtainable, or cannot be obtained at any of the stream gaging stations herein referred to, such stations may, with the unanimous approval of the Commission, be abandoned, and with such approval another station, or other stations, shall be established and new measurements shall be substituted which, in the unanimous opinion of the Commission, will result in substantially the same results, so far as the rights and obligations to deliver water are concerned, as would have existed if such substitution of stations and measurements had not been so made.

ARTICLE VI.

Commencing with the year following the effective date of this Compact, all credits and debits of Colorado and New Mexico shall be computed for each calendar year; provided, that in a year of actual spill no annual credits nor annual debits shall be computed for that year.

In the case of Colorado, no annual debit nor accrued debit shall exceed one hundred thousand (100,000) acre-feet, except as either or both may be caused by holdover storage water in reservoirs constructed after 1937 in the drainage basin of the Rio Grande above Lobatos. Within the physical limitations of storage capacity in such reservoirs, Colorado shall retain water in storage at all times to the extent of its accrued debit.

In the case of New Mexico, the accrued debit shall not exceed two hundred thousand (200,000) acre-feet at any time, except as such debit may be caused by holdover storage of water in reservoirs constructed after 1929 in

the drainage basin of the Rio Grande between Lobatos and San Marcial. Within the physical limitations of storage capacity in such reservoirs, New Mexico shall retain water in storage at all times to the extent of its accrued debit. In computing the magnitude of accrued credits or debits, New Mexico shall not be charged with any greater debit in any one year than the sum of one hundred fifty thousand (150,000) acre-feet and all gains in the quantity of water in storage in such year.

The Commission by unanimous action may authorize the release from storage of any amount of water which is then being held in storage by reason of accrued debits of Colorado or New Mexico; provided, that such water shall be replaced at the first opportunity thereafter.

In computing the amount of accrued credits and accrued debits of Colorado or New Mexico, any annual credits in excess of one hundred and fifty thousand (150,000) acre-feet shall be taken as equal to that amount.

In any year in which actual spill occurs, the accrued credits of Colorado or New Mexico, or both, at the beginning of the year shall be reduced in proportion to their respective credits by the amount of such actual spill; provided, that the amount of actual spill shall be deemed to be increased by the aggregate gain in the amount of water in storage, prior to the time of spill, in reservoirs above San Marcial constructed after 1929; provided, further, that if the Commissioners for the States having accrued credits authorize the release of part, or all, of such credits

in advance of spill, the amount so released shall be deemed to constitute actual spill.

In any year in which there is actual spill of usable water, or at the time of hypothetical spill thereof, all accrued debits of Colorado or New Mexico, or both, at the beginning of the year shall be cancelled.

In any year in which the aggregate of accrued debits of Colorado and New Mexico exceeds the minimum unfilled capacity of project storage, such debits shall be reduced proportionally to an aggregate amount equal to such minimum unfilled capacity.

To the extent that accrued credits are impounded in reservoirs between San Marcial and Courchesne, and to the extent that accrued debits are impounded in reservoirs above San Marcial, such credits and debits shall be reduced annually to compensate for evaporation losses in the proportion that such credits or debits bore to the total amount of water in such reservoirs during the year.

ARTICLE VII.

Neither Colorado nor New Mexico shall increase the amount of water in storage in reservoirs constructed after 1929 whenever there is less than four hundred thousand (400,000) acre-feet of usable water in project storage; provided, that if the actual releases of usable water from the beginning of the calendar year following the effective date of this Compact, or from the beginning of the calendar year following actual spill, have aggregated more

than an average of seven hundred and ninety thousand (790,000) acre-feet per annum, the time at which such minimum stage is reached shall be adjusted to compensate for the difference between the total actual release and releases at such average rate; provided, further, that Colorado or New Mexico, or both, may relinquish accrued credits at any time, and Texas may accept such relinquished water, and in such event the State or States so relinquishing shall be entitled to store water in the amount of the water so relinquished.

ARTICLE VIII.

During the month of January of any year the Commissioner for Texas may demand of Colorado and New Mexico, and the Commissioner for New Mexico may demand of Colorado, the release of water from storage reservoirs constructed after 1929 to the amount of the accrued debits of Colorado and New Mexico, respectively, and such releases shall be made by each at the greatest rate practicable under the conditions then prevailing, and in proportion to the total debit of each, and in amounts, limited by their accrued debits, sufficient to bring the quantity of usable water in project storage to six hundred thousand (600,000) acre-feet by March 1st and to maintain this quantity in storage until April 30th, to the end that a normal release of seven hundred and ninety thousand (790,000) acre-feet may be made from project storage in that year.

ARTICLE IX.

Colorado agrees with New Mexico that in event the United States or the State of New Mexico decides to construct the necessary works for diverting the water of the San Juan River, or any of its tributaries, into the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of waters from the San Juan River, or the tributaries thereof, into the Rio Grande in New Mexico, provided the present and prospective uses of water in Colorado by other diversions from the San Juan River, or its tributaries, are protected.

ARTICLE X.

In the event water from another drainage basin shall be imported into the Rio Grande Basin by the United States or Colorado or New Mexico, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefor in the application of the schedules.

ARTICLE XI.

New Mexico and Texas agree that upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be interpreted to prevent recourse by a signatory State to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory

State to the injury of another. Nothing herein shall be construed as an admission by any signatory State that the use of water for irrigation causes increase of salinity for which the user is responsible in law.

ARTICLE XII.

To administer the provisions of this Compact there shall be constituted a Commission composed of one representative from each State, to be known as the Rio Grande Compact Commission. The State Engineer of Colorado shall be ex-officio the Rio Grande Compact Commissioner for Colorado. The State Engineer of New Mexico shall be ex-officio the Rio Grande Compact Commissioner for New Mexico. The Rio Grande Compact Commissioner for Texas shall be appointed by the Governor of Texas. The President of the United States shall be requested to designate a representative of the United States to sit with such Commission, and such Representative of the United States, if so designated by the President, shall act as Chairman of the Commission without vote.

The salaries and personal expenses of the Rio Grande Compact Commissioners for the three (3) States shall be paid by their respective States, and all other expenses incident to the administration of this Compact, not borne by the United States, shall be borne equally by the three (3) States.

In addition to the powers and duties hereinbefore specifically conferred upon such Commission and the Members thereof, the jurisdiction of such Commission shall extend

only to the collection, correlation, and presentation of factual data and the maintenance of records having a bearing upon the administration of this Compact, and, by unanimous action, to the making of recommendations to the respective States upon matters connected with the administration of this Compact. In connection therewith, the Commission may employ such engineering and clerical aid as may be reasonably necessary within the limit of funds provided for that purpose by the respective States. Annual reports compiled for each calendar year shall be made by the Commission and transmitted to the Governors of the signatory States on or before March 1st following the year covered by the report. The Commission may, by unanimous action, adopt rules and regulations consistent with the provisions of this Compact to govern their proceedings.

The findings of the Commission shall not be conclusive in any Court or tribunal which may be called upon to interpret or enforce this Compact.

ARTICLE XIII.

At the expiration of every five-year period after the effective date of this Compact, the Commission may, by unanimous consent, review any provisions hereof which are not substantive in character and which do not affect the basic principles upon which the Compact is founded, and shall meet for the consideration of such questions on the request of any member of the Commission; provided, however, that the provisions hereof shall remain in full force and effect until changed and amended within the intent

of the Compact by unanimous action of the Commissioners; and until any changes in this Compact are ratified by the Legislatures of the respective States and consented to by the Congress, in the same manner as this Compact is required to be ratified to become effective.

ARTICLE XIV.

The schedules herein contained and the quantities of water herein allocated shall never be increased nor diminished by reason of any increase or diminution in the delivery or loss of water to Mexico.

ARTICLE XV.

The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby, and to the development thereof, have actuated this Compact and none of the signatory States admits that any provisions herein contained establishes any general principle or precedent applicable to other interstate streams.

ARTICLE XVI.

Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties, or to the Indian Tribes, or as impairing the Rights of the Indian Tribes.

ARTICLE XVII.

This Compact shall become effective when ratified by the Legislatures of each of the signatory States and con-

sented to by the Congress of the United States. Notice of ratification shall be given by the Governor of each State to the Governors of the other States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of each of the signatory States of the consent of the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this Compact in quadruplicate original, one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, in the State of New Mexico, on the 18th day of March, in the year of our Lord, One Thousand Nine Hundred and Thirty-eight.

(Signed) M. C. HINDERLIDER
(Signed) THOMAS M. McCLURE
(Signed) FRANK B. CLAYTON

Approved
(Signed) S. O. HARPER

APPENDIX B

Reclamation Act of June 17, 1902

Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the

same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: PROVIDED, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

* * * * *

Sec. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: PROVIDED, That when the payments required by this

Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: PROVIDED, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

* * * * *

SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or used of water in, to, or from any interstate stream or the waters thereof: PROVIDED, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irri-

gated, and beneficial use shall be the basis, the measure, and the limit of the right.

* * * * *

Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

Approved, June 17, 1902.

APPENDIX C

Act of February 25, 1905
33 Stat. 814

"That the provisions of the reclamation act approved June seventeenth, nineteen hundred and two, shall be extended for the purposes of this act to the portion of the State of Texas bordering upon the Rio Grande which can be irrigated from a dam to be constructed near Engle, in the Territory of New Mexico, on the Rio Grande, to store the flood waters of that river, and if there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise, then the Secretary of the Interior may proceed with the work of constructing a dam on the Rio Grande as part of the general system of irrigation, should all other conditions as regards feasibility be found satisfactory."

APPENDIX D

Act of June 12, 1906
34 Stat. 259

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, be, and the same are hereby, extended so as to include and apply to the State of Texas.

Approved, June 12, 1906.

APPENDIX E

Section 22 of Chapter 102
Laws of 1905
36th Legislative Assembly of the
Territory of New Mexico

Whenever the proper officers of the United States, authorized by law to construct irrigation works, shall notify the territorial irrigation engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated at the date of such notice, shall not be subject to further appropriations under the laws of New Mexico, and no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the territory,

except as to such amount of the water described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized.

Section 40 of Chapter 49
Laws of 1907
37th Legislative Assembly of the
Territory of New Mexico

Whenever the proper officers of the United States, authorized by law to construct works for the utilization of waters within the Territory, shall notify the territorial engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated, and not covered by applications or affidavits duly filed or permits as required by law, at the date of such notice, shall not be subject to a further appropriation under the laws of the Territory for a period of three years from the date of said notice, within which time the proper officer of the United States shall file plans for a proposed work in the office of the territorial engineer for his information, and no adverse claim to the use of water required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory, except as to such amount of the water described in such notice as may be formally released in writing by an officer of the United States, thereunto duly authorized: Provided, That in case of failure to file plans or the proposed work within three years, as herein required, the waters specified in the notice given by

the United States to the territorial engineer shall become public waters, subject to general appropriations.

APPENDIX F

New Mexico "Enabling Act"
36 Stat. 557, at 559

Seventh. That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a Territory.

APPENDIX G

Art. XXI
Constitution of New Mexico
Sec. 7. (Reclamation Projects.)

There are hereby reserved to the United States, with full asquiescence of the people of this state, all rights and powers for the carrying out of the provisions by the United States of the act of congress, entitled, "An act appropriating the receipts from the sale and disposal of public lands in certain states and territorie to the construction of irrigation works for the reclamation of arid lands," approved

June seventeenth, nineteen hundred and two, and acts amendatory thereof or supplementary thereto, to the same extent as if this state had remained a territory.

APPENDIX H

Article 16, Section 59 of the Constitution of the State of Texas

Sec. 59. (a) The conservation and development of all the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflow lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

(b) There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to

exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.

(c) The Legislature shall authorize all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment and all such indebtedness may be evidenced by bonds of such conservation and reclamation districts, to be issued under such regulations as amy (may) be prescribed by law and shall also, authorize the levy and collection within such districts of all such taxes, equitably distributed, as may be necessary for the payment of the interest and the creation of a sinking fund for the payment of such bonds; and also for the maintenance of such districts and improvements, and such indebtedness shall be a lien upon the property assessed for the payment thereof; provided the Legislature shall not authorize the issuance of any bonds or provide for any indebtedness against any reclamation district unless such proposition shall first be submitted to the qualified property tax-paying voters of such district and the proposition adopted. Added Aug. 21, 1917, proclamation Oct. 2, 1917.

APPENDIX J

Sections 1, 2, and 92 of the Charter of the City of El Paso

Section 1. That all the inhabitants of the City of El Paso, in El Paso County, Texas, as the boundaries and limits of said city are herein established or may be here-

after established shall constitute and continue to be a body politic and corporate by the name and style of the "City of El Paso," and as such they and their successors by that name shall have perpetual succession, and shall have, exercise and enjoy all the rights, immunities, powers, privileges and franchises now possessed and enjoyed by the said city as well as those herein granted or conferred; and shall be subject to all the duties and obligations now pertaining to or incumbent upon said city as a corporation not inconsistent with this Act; they shall be known by the same name in law and thereunder shall be capable of suing and being sued, impleading or being impleaded, answer and being answered in all courts and places, and in all matters whatsoever; of contracting and being contracted with; may take, acquire, hold and purchase, lease, grant, sell or convey such property, real, personal, or mixed, as the needs or purposes of the corporation may require, either within or without the limits of the city, including real estate without the limits of the City of El Paso, for the burial of the dead, for the erecting or operation of waterworks to supply the city with water, for the establishment and operation of gas or electric light works to supply the city with light, for the establishment of a hospital or hospitals for the reception of persons afflicted with contagious or other diseases, for public parks, for a poorhouse or poorhouses, a workhouse, house of correction, rock pile or quarries for the employment of city convicts, and for any other purpose authorized

by this Act; to have a corporate seal, and to prescribe and alter the same at will.

GENERAL POWERS

Section 2. The City of El Paso shall have power to enact and to enforce all ordinances necessary to protect health, life and property, and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and its inhabitants; to protect the lives, health and property of the inhabitants of said city, and to enact and enforce any and all ordinances upon any subject; provided, that no ordinance shall be enacted inconsistent with the laws of the State of Texas, or inconsistent with the provisions of this Act; and provided, further, that the specification of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this Act to grant to and bestow upon the inhabitants of the City of El Paso full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this Charter or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas.

Section 92. To provide, or cause to be provided, the city with water; to make, regulate and establish public wells, pumps, and cisterns, hydrants and reservoirs in the streets or elsewhere within the city or beyond the limits thereof, for the extinguishment of fires and the convenience of the inhabitants; to prevent the unnecessary waste of water,

and to make, establish and regulate all irrigation ditches and have entire control of the same.

APPENDIX K

Revised Civil Statutes of Texas
Articles 7547, 7548, 7549, 7587, 7588, 7622, 7653, 7657, 7752, 7807-d—Sec. 6, 7880-53

* * * * *

Art. 7547: Any person, association of persons, corporation, water improvement or irrigation district having in possession and control storm, flood or rain waters conserved or stored, under the provision of this Act, may enter into contract to supply same to any person, association of persons, corporation, water improvement or irrigation district having the right to acquire such use; provided that the price and terms of such contract shall be just and reasonable and without discrimination and subject to the same revision and control as hereinafter provided for other water rates and charges; provided, that if any person shall use such stored or conserved water without first entering into contract with the party having stored or conserved the same, such user shall pay for the use thereof such charges or rental as the board shall find to be just and reasonable, and subject to revision by the court, as herein provided for other water rates and charges.

Art. 7548: For the purpose of conveying and delivering storm, flood or rain water from the place of storage to the place of use, as provided in the preceding section, it shall be lawful for any person, association of persons, corpora-

tion, water improvement or irrigation district to use the banks and beds of any flowing natural stream within this State, under and in accordance with such rules and regulations as may be prescribed by the board of water engineers, and such board shall prescribe rules and regulations for such purpose. No person, association of persons, corporations, water improvement or irrigation district who has not acquired the right to the use of such conserved or stored waters, as provided in the last preceding Section, shall take, use or divert same.

Art. 7549: Any person, association of persons, corporation, water improvement or irrigation district, or the agent, officer, employee or representative of any such person, association of persons, corporation, water improvement or irrigation district, who shall wilfully interfere with the passage of, or take, divert or appropriate such conserved or stored water during the passage and delivery thereof, as provided in the last two preceding articles, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding one hundred dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment, and each and every day that such taking, diversion or appropriation may be made shall constitute a separate offense.

* * * * *

Art. 7587: When, in the examination of any irrigation or reclamation project, under the provisions of the Act of

Congress, known as the Reclamation Act, approved June 17, 1902, it shall be found advisable or necessary to irrigate or reclaim lands within the limits of this State, the Secretary of the Department of the Interior is authorized to make all necessary examinations and surveys for, and to locate and construct irrigation or reclamation works within this State, and to perform any and all acts necessary to carry into effect the provisions, limitations, charges, terms and conditions of said Reclamation Act.

Art. 7588: The provisions of this Act shall in all things apply to the construction, maintenance and operation of any irrigation works in this State, constructed under what is known as the Federal Reclamation Act, approved June 17, 1902, and the amendments thereto, insofar as the provisions of this Act are not inconsistent with said Act of Congress, or the amendments thereto, or the regulations prescribed by the Secretary of the Department of the Interior in conformity to such Reclamation Act and the amendments thereto.

* * * * *

Sec. 137. Nothing in this Act contained shall be held or construed to alter, affect, impair, increase, destroy, validate or invalidate any existing or vested right of property existing at the date when this Act goes into effect.

* * * * *

Sec. 139. Chapter 171 of the General Laws of the regular session of the Thirty-third Legislature, and all other

laws and parts of laws in conflict with the provisions of this Act are hereby repealed.

* * * * *

(Effective June 19, 1917)

Art. 7622. Water improvement districts established

The County Commissioners' Court of any county in this State at any Regular or Called Session thereof may establish one or more Water Improvement Districts in their respective counties, or parts of such districts therein, in the manner hereinafter provided. Such districts may or may not include within their boundaries, villages, towns, cities and municipal corporations, or any part thereof, but no land shall be at the same time included within the boundaries of more than one Water Improvement District created under this Chapter. Such districts when so established may make improvements or may purchase improvements already existing, or may purchase improvements and make additions thereto, or may contract with any other Water Improvement District, Water Control and Improvement District, or any Conservation and Reclamation District for a water supply and may purchase or make such improvements as may be necessary to receive and distribute such water supply, and may incur indebtedness to fully carry out each and all of the purposes of its organization, and may issue bonds in payment therefor, as herein provided. Such districts being authorized to provide for the irrigation of the land included therein, and when operating under Section 59 of Article 16, of the Constitution, furnish water for domestic, power and commercial purposes. Such dis-

tricts may be formed for cooperation with the United States under the Federal Reclamation Laws for the purpose of the construction of irrigation works, including drainage works, necessary to maintain the irrigability of the land for the purchase, extension, operation or maintenance of constructed works or for the assumption, as principal or guarantor, of indebtedness to the United States on account of district lands. (Acts 2nd C. S., 1919, p. 65, part §1; Acts 1929, 41st Leg., 2nd C. S., p. 7, ch. 6, §1.)

Art. 7653. Contract with United States

The board of directors, on behalf of said district, may enter into any obligation or contract with the United States for the construction, operation and maintenance of the necessary work for the delivery and distribution of water therefrom, or for the drainage of district lands or for the assumption of indebtedness to the United States for district lands, *or for the temporary rental of water from the United States for district lands or a part thereof*, under the provisions of the Federal Reclamation Act, and all acts amendatory thereof or supplementary thereto, and the rules and regulations established thereunder: *or the board may contract with the United States for a water supply under any Act of Congress providing for or permitting such contract*, and in case contract has been or hereafter may be made with the United States as herein provided, bonds of the district may be deposited with the United States at ninety (90) percent of their par value, to the amount to be paid by the district to the United States under any such contract, the interest on said bonds to be

provided for by assessment and levy as in the case of other bonds of the district, and regularly paid to the United States to be applied as provided in such contracts, and if bonds of the district are not so deposited it shall be the duty of the board of directors to include as part of any levy or assessment now provided for by law, an amount sufficient to meet each year all payments accruing under the term of any such contract; and the board may accept on behalf of the district appointment of the district as fiscal agent of the United States in connection with any Federal reclamation project, whereupon the district shall be authorized to so act, and to assume the duties and liabilities incident to such action, and the said board shall have full power to do any and all things required by the Federal statutes now or hereafter enacted in connection therewith and all things required by the rules and regulations now or that may hereafter be established by any department of the Federal Government in regard thereto. (Acts 1917, p. 179, §21.)

Art. 7657. Property conveyed to United States

Any property acquired may be conveyed to the United States in so far as the same shall be necessary for the construction, operation and maintenance of works by the United States for the benefit of the district under any contract that may be entered into thereunder.

Art. 7752. Expense estimated

* * * The directors of all districts shall within ten days after any assessment is due, post in a public place in said district a list of all such delinquents and shall thereafter

keep posted a correct list of all such delinquents; provided, however, that if the parties owing such assessments shall have executed notes and contracts as hereinbefore provided, they shall not be placed upon such delinquent list until after the maturity of such notes and contracts. In the event that contract shall be made with the United States, the remedies in this section hereinbefore provided in favor of the district shall apply with regard to the operation and maintenance and rental charges which may become due to the United States. Provided, however, that the Federal Reclamation Laws, and in particular, the Reclamation Extension Act approved August 13, 1914, and any Acts amendatory thereof shall be applicable. Moreover, all water, the right to the use of which is acquired by the district under contract with the United States, shall be distributed and apportioned by the district in accordance with the Acts of Congress, and rules and regulations of the Secretary of the Interior, and the provisions of such contract in relation thereto. (Acts 1923, p. 379, §95; Acts 1927, 40th Leg., p. 138, ch. 90, §1.)

Art 7807d—Sec. 6. Cooperation with United States

Water Power Control Districts and Water Improvement Districts and Irrigation Districts included within Water Power Control Districts are fully authorized and empowered to cooperate with the United States under the National Industrial Recovery Act, and/or Federal Reclamation laws, and/or any and all laws of the United States applying to the aid of public works furnishing or securing funds for any and all purposes coming within the powers of such

Districts so organized and concerning or pertaining to the conservation and use and control of water for any and all lawful purposes. The provisions hereof that such Districts may so cooperate with the United States is not intended as a limitation upon their power to operate as a Water Improvement District.

Art. 7880-53. Contract with United States

Any district authorized under Section 59, Article 16, of the Constitution, with the object, among other things, of irrigating arid land, is hereby empowered through its board of directors to contract with the United States of America for the purpose of providing for the investigation, construction, extension and operation and maintenance of any Federal reclamation project of benefit to the district and authorized under the National Reclamation Act of June 17, 1902 (Thirty-second United States Statutes at Large, page 388), and acts now and hereafter amendatory thereof or supplementary thereto, and all herein styled the National Reclamation Law, and the securing of a district water supply therefrom, and to pay to the United States the agreed cost thereof in the form of construction charges, operation and maintenance charges, and water rental charges, as shown by such contract and in accordance with the terms and conditions of the National Reclamation Law, and the regulations now and hereafter promulgated thereunder. The construction charges may include the cost of drainage and flood control works necessary to control floods or to maintain the irrigability of district land, and the cost of incidental electric power and municipal water

service made feasable through the water supply of the reclamation project. Every such contract involving the payment of construction charges to the United States shall be voted upon by the electors of the district as in the case of an issue of district bonds, and the provisions of this Act relating to the election upon, approval and validation of such bonds shall be followed, so far as applicable, including the prosecution of an action in court to determine the validity of the contract. The notice of election shall state the maximum amount, exclusive of operation and maintenance charges, water rental charges, interest and penalties, payable by the district to the United States under the contract and the ballot shall contain the following words; and no others: "For contract with the United States of America and levy of taxes and payment therefor," and "Against contract with the United States of America and levy of taxes and payment therefor." Any such district may convey real property to the United States in connection with the construction or operation and maintenance of Federal reclamation works used or to be used for the benefit of the district. Where a contract is made under this section, between a district and the United States, providing for use by the district of Federal Reclamation works, the district need not prepare or file any engineering data respecting the construction of such works. Until all moneys receivable by the United States from any such district under any such contract shall have been fully paid, the boundaries of such district shall not be altered without the consent of the United States. Any such district contracting with the United States under this section shall annually levy taxes

in amount to provide payment of all installments of charges as required by the contract and the district may, under authority of a vote of the district electors as provided in this Act, apportion benefits and levy and collect taxes on a benefit basis instead of on an ad valorem basis, and may when provided by contract make payment of construction charges on the basis of the average gross annual acre income of the lands of the district or designated divisions or subdivisions thereof, as such annual gross acre income is determined by the Secretary of the Interior. The annual levies of assessments shall be sufficient to collect the amount of money required to meet all the district's obligations in full when due notwithstanding any delinquency in payment of assessments by any tract of land. If collections in any year prove insufficient to meet the obligations of the district, the levy shall be increased the following years to a sufficient extent to cover the deficit. The annual levies for payment of construction charges shall continue to be made each year against each tract of land in the district until the full amount apportioned against the same has been paid notwithstanding that such construction charges apportioned against other tracts of land in the district may sooner or later be paid out. The lien against district lands on account of any such contract with the United States shall be superior and dominant to the lien on account of any district bonds approved subsequent to date of such contract.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 16 1957
JOHN T. FEY, Clerk

No. 195

In the Supreme Court of the United States

October Term, 1957

CITY OF EL PASO, PETITIONER,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, L. D. McCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BERRIS, AND W. L. SUMMERS, TOGETHER WITH THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	3
1. The contracts respecting rights to the use of Rio Grande water	3
2. Quitclaim deed of a right of way for the Franklin Canal	7
3. The proceedings in the District Court and the Court of Appeals	8
Argument	10
Conclusion	13

CITATIONS

Cases:

Helvering v. *Stuart*, 317 U. S. 154	12
MacGregor v. *State Mutual Co.*, 315 U. S. 280	12
Propper v. *Clark*, 337 U. S. 472	12
Spiegel, Estate of, v. *Commissioner*, 335 U. S. 701	12
Texas v. *New Mexico*, 352 U. S. 991	12

435696—57

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 198

CITY OF EL PASO, PETITIONER

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, L. D. McCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BRIGGS, AND W. L. SUMMERS, TOGETHER WITH THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas is reported at 133 F. Supp. 894. The opinions in the United States Court of Appeals for the Fifth Circuit (Pet. App. 41–57) are reported at 243 F. 2d 927.

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1957 (Pet. App. 55). On May 24, 1957, a timely petition for rehearing was denied (Pet. App. 56–57).

The petition for a writ of certiorari was filed on June 17, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner and respondents were empowered to enter into the contracts which are the subject matter of this case, and whether the parties to those contracts are bound by them.

2. Whether the Court of Appeals erred in the construction it placed upon the contract of August 10, 1949, entered into between the respondents and the petitioner in regard to their respective rights to the use of water from the Rio Grande.

3. Whether the contract of August 10, 1949, between the United States and El Paso County Water Improvement District No. 1, and the petitioner—pursuant to which the former withdrew its protest filed with the Texas Board of Water Engineers in opposition to petitioner's application to appropriate rights to the use of water from the Rio Grande in consideration of the petitioner's agreement subordinating its claimed rights to the use of water to those of the United States—is valid and enforceable.

4. Whether the term "maintenance" in a quitclaim deed dated November 9, 1939, from the petitioner to the United States, as that term relates to bridges across the Franklin Canal, requires the replacement of existing bridges kept in good repair.

5. Whether the Court of Appeals erred in deciding that the respective rights to the use of water in the Rio Grande of the petitioner and the United States

were definitely established by the contracts between them, particularly the compromise contract of August 10, 1949.

STATEMENT

This litigation was initiated by the El Paso County Water Improvement District No. 1 (and certain individual plaintiffs) and the United States, respondents here, for the primary purpose of securing declaratory relief respecting the validity and effect of two categories of contracts among the parties: (1) those relating to rights to the use of water from the Rio Grande; and (2) a quitclaim deed containing covenants obligating the United States to "maintain" certain bridges within the municipal area of petitioner.

1. *The Contracts Respecting Rights to the Use of Rio Grande Water.* The United States entered into a contract dated February 18, 1941 (R. I, 400, Pl. Ex. P–27), pursuant to which the petitioner secured a supply of water from the Rio Grande Reclamation Project. That project, situated on the Rio Grande, impounds water in New Mexico for use in that State and in Texas. The contract provides, in relevant part:

> [a] * * * the City * * * needs and desires to procure from the [Rio Grande Reclamation] project water supply a supplemental water supply to meet the present and anticipated future needs of the City * * * and there is available to the City no practicable source of such supplemental water supply other than the said project water supply; * * *
>
> [b] * * * the City for the purpose of securing [from the Project the needed water sup-

> ply] * * * without interference to the water supply of other [El Paso County Water Improvement] District water right lands, proposes to acquire not to exceed two thousand acres of District water right lands, and desires to receive each year from the project water supply an amount of water not to exceed the amount of water which such acquired lands would be entitled to receive from said water supply for the respective year, * * * [R. I, 406, Pl. Ex. P-27.]

Subsequently, by an instrument dated December 1, 1944, petitioner secured from the United States an additional supply of water from the project (R. I, 427).

Petitioner filed on November 1, 1948, with the Texas State Board of Water Engineers, an application to store and divert from the Rio Grande 27,000 acre-feet of water per annum (R. I, 447).

Following petitioner's application to appropriate rights in the Rio Grande, a third contract, dated August 10, 1949, was entered into between petitioner and respondent El Paso County Water Improvement District No. 1 (R. I, 485). That contract was approved by the United States (R. I, 509, 515). It contains the following provisions (R. I, 485–490; see Pet. App. 51–52):

> Whereas, there has been appropriated under the laws of New Mexico and Texas, for and on behalf of the Rio Grande Federal Irrigation Project * * *, comprising lands of the District and the Elephant Butte Irrigation District * * * and the District claims all such appropriations over all of the appropriable waters

of the Rio Grande River for the irrigation of lands in said districts; and,

* * * * *

Whereas, the City has urged a claim in equity against the Rio Grande Project for sewage effluent placed in the Rio Grande River from the City's operation of its sewage and water systems * * *; and,

Whereas, it is the desire of the District and of the City to cooperate to the end of avoiding controversy and litigation between themselves and to settle and compromise their respective claims involving relative rights and priorities of use of the waters hereinabove referred to, * * *.

Now, Therefore, it is agreed: (1) The District, subject to approval hereof by the Secretary of the Interior of the United States, will permit use, by the City, of Rio Grande Project works serving the District lands, for the purpose of this agreement * * * all as determined by the Project Manager of the Rio Grande Project * * *.

* * * * *

* * * It is expressly understood that in executing this contract, or in accepting the benefits thereof, the City shall not be held to have in anywise relinquished, modified or impaired its title to, ownership of, and its right to control and determine the use and disposition of such effluent prior to its discharge into the Rio Grande. It is further understood that after such effluent is discharged into the Rio Grande, it constitutes part of the Project water supply.

* * * * *

In summary, the United States and the El Paso County Water Improvement District No. 1 recog-

nied in the petitioner a secondary and subordinate right to divert water from the Rio Grande when available and surplus; the use under specified conditions of project facilities; the right of petitioner to control the disposition of its sewage effluent, but that once delivered into the Rio Grande, that effluent would constitute a "part of the Project water supply."

The contract of August 10, 1949, also provided (R. I, 490):

> If the City shall elect to prosecute said Application [with the State Board of Water Engineers] to a conclusion, any award or permit granted thereunder * * * shall, by stipulation of the parties hereto filed in said proceeding be made subject to the terms and conditions of this undertaking.

As contemplated by this clause, there was filed on December 1, 1949, with the Texas State Board of Water Engineers a stipulation by petitioner, the El Paso County Water Improvement District No. 1, and the United States, pursuant to which it was agreed that any permit to divert Rio Grande water granted to petitioner "* * * shall stand expressly conditioned by and made subject to the terms" of the contract of August 10, 1949 (R. I, 528, 534).

Predicated upon the contract and stipulation, the United States and the El Paso County Water Improvement District No. 1 withdrew the protest (R. I, 455) to petitioner's application to appropriate water which they had previously filed with the Texas State Board of Water Engineers. The Board was notified of the compromise contained in the contract of Au-

gust 10, 1949 (R. I, 482), and on May 10, 1950, the Board issued to petitioner a permit to appropriate certain rights to the use of the water (R. I, 504, 508).

Thereafter, on June 22, 1950, petitioner and respondent El Paso County Water Improvement District No. 1 contracted that "To avoid any question or controversy, it is agreed that the Permit [based on petitioner's application to appropriate] * * * is subject to the contract of August 10, 1949 * * *" (R. I, 536).

2. *Quitclaim Deed of a Right of Way for the Franklin Canal.* By a quitclaim deed dated November 9, 1939, petitioner conveyed all of its right, title and interest in and to the Franklin Canal to the United States (R. I, 245). That canal is a major component of the Rio Grande Reclamation Project and traverses a large section of the municipal area within the City's boundaries. Contained in the quitclaim deed is the proviso (R. I, 247) that "this conveyance is subject to the condition that the United States shall be obligated to maintain the said bridges at the * * * crossings" of the Franklin Canal, all of which bridges are designated in the deed. It was also provided in the quitclaim deed that the obligation of the United States to "maintain" the bridges is contingent upon "appropriations being made therefor by Congress" (R. I, 247). The petitioner reserved "the right to construct and maintain at its own cost and expense * * * additional bridges" across the Franklin Canal (R. I, 247). On the same date as the quitclaim deed, respondent El Paso County Water Improvement District No. 1 obligated itself to provide

funds to "maintain" the bridges whenever Congress did not provide them (R. I, 23).

3. The Proceedings in the District Court and the Court of Appeals. The relief sought by the United States and the El Paso County Water Improvement District No. 1 was to establish their respective rights to the use of water in the Rio Grande and to have determined the validity and effect of the contracts referred to above (R. I, Amended Complaint, 13–49). By way of answer and counterclaim (R. I, 51–79), petitioner contested these claims, and denied the validity of the contracts, deed, and implementing city ordinances; sought recovery of $51,397.69 allegedly due it for the cost of bridges it had built across the Franklin Canal; and sought injunctive relief against the refusal to it of free use of the project facilities.

After a full trial on the merits, the District Court entered an amended and corrected judgment and decree (R. III, 1752). As to the contracts between respondents and petitioner respecting rights to the use of Rio Grande water, the trial court declared (R. III, 1756–1757):

> [a] the contract dated February 18, 1941, * * * is in all respects valid and binding on all of the parties to it;
>
> [b] the contract dated December 1, 1944, * * * is in all respects valid and binding * * *;
>
> [c] the contract of August 10, 1949 * * * is valid and binding on the parties thereto in its aspect as to rental of Project works for use in delivery of water * * *.

In the amended and corrected judgment and decree, the trial court further declared (R. III, 1757–1758) that:

> * * * whenever there is Project water standing or flowing in the Rio Grande * * * and while the * * * [petitioner] continues to discharge the municipal sewage effluent into the river bed [the petitioner] shall have the right and be entitled to take and have by its own means and pay free * * * an aggregate quantity of Project water within a maximum equal to the quantity of sewage effluent being discharged currently into the river bed * * *.

With respect to the rights to the use of water by the United States, the El Paso County Water Improvement District No. 1, and the petitioner, the trial court also held (R. III, 1753–1754):

> * * * the waters of the Rio Grande to which the United States is entitled for the benefit of the Rio Grande Reclamation Project * * * are definitely committed in prior right by the Rio Grande Compact of 1938 between Colorado, New Mexico and Texas * * *. [Petitioner] is entitled to have and use * * * waters from the Rio Grande covered by the Permit issued to it by the Texas Board of Water Engineers, dated May 10, 1950, * * * but the water entitlement of the defendant under said Permit is fully subject to the priority and superiority of the appropriative rights and entitlement held by the * * * United States of America * * *, by force of the Compact and under 'Certified Filing' No. 123, [the latter rights having been purchased many years ago by the United States] * * *.

With respect to the controversy over the condition contained in the quitclaim deed of November 9, 1939, *supra*, p. 7, the court adjudged respondent El Paso County Water Improvement District No. 1 secondarily liable to maintain the bridges across the Franklin Canal:

> and the burden of such maintenance * * * includes any and all reasonable replacements, rebuilding, restoration, enlargement, reinforcement and repairs of said bridges * * *. [R. III, 1760–1761.]

From that judgment and decree the United States and the El Paso County Water Improvement District No. 1 appealed. Petitioner cross-appealed. Affirming the District Court on petitioner's appeal, and reversing on all points upon which the respondents appealed, the Court of Appeals held that (1) the contract of August 10, 1949, "binds the city [petitioner] against, and prevents, the assertion of, the claim it now makes" (Pet. App. 53); and (2) "the word 'maintain' used in the deed [the quitclaim deed of November 9, 1939] under which the United States holds, it is quite plain that, in its common acceptance, it simply did not mean anything like what the [trial] court held that it did" (Pet. App. 48).

ARGUMENT

1. The Court of Appeals properly restricted its consideration to the ordinary principles of contract law which are in themselves sufficient to determine the issues in this case. The court correctly decided that it was unnecessary to venture into the field of State-Federal relationship respecting rights

in interstate streams or to undertake a review of the complex questions presented by petitioner in regard to the Rio Grande Compact or the authority of the State of Texas to control all of the waters within its boundaries. Rather, the court simply decided that:

(a) Petitioner and respondents alike were empowered to execute the contracts of February 18, 1941, December 1, 1944, and the contract of August 10, 1949, and that all the parties were bound by them;

(b) The agreement by respondents to withdraw their protest before the Texas State Board of Water Engineers constituted an adequate consideration to support the contract pursuant to which petitioner subordinated its right to those of respondents;

(c) It was error for the trial court, when sustaining the validity of the contract of August 10, 1949, regarding the use of project facilities, to rewrite the contract, in effect, by permitting the petitioner to exchange "sewage effluent" for project water although the contract does not so provide; and

(d) It was error for the trial court to read into the word "maintain," as used in the quitclaim deed of November 9, 1939, from petitioner to the United States, an obligation on the latter to include "any and all reasonable replacements, rebuilding * * * and repairs of said bridges * * * [to keep them] adequate for the present and future needs of all common traffic * * * whatever the growth in such traffic density over the years * * *."

These sound rulings are all based upon the particular terms of these particular contracts and the other

instruments. There is no need for further review by this Court. Insofar as the rulings rest on Texas law, no sufficient reason is put forth for overruling the views on Texas law of the Court of Appeals for the Fifth Circuit, speaking through Chief Judge Hutcheson. See, *e. g.*, *MacGregor* v. *State Mutual Co.*, 315 U. S. 280; *Helvering* v. *Stuart*, 317 U. S. 154, 164; *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707–708; *Propper* v. *Clark*, 337 U. S. 472, 486–487.[1] Insofar as federal contract law may be involved, the issues are clearly too narrow and special to call for consideration by this Court.

2. Petitioner seeks needlessly to inject into the case broad questions as to the effect of the Rio Grande Compact (Pet. 3, 11, 14ff) which are not truly presented and should not be decided in this litigation. If petitioner's contentions were accepted, it would call for a full review of the compact involving the three States of Colorado, New Mexico, and Texas. Resolution of the basic questions petitioner unjustifiably raises would require the presence of these States, at least of New Mexico and Texas, assuming jurisdiction could be found over them in the trial court. Thus, petitioner seeks review of matters concerning which jurisdictional objections would necessarily be interposed because of the want of indispensable parties. Cf. *Texas* v. *New Mexico*, 352 U. S. 991.

[1] The ample support in Texas law for these rulings is shown in the Brief in Opposition for All Respondents Except the United States of America, at pp. 10–12, 29, 31–33, 34–35, 37–38, 39.

Since the whole controversy can be, and has been, resolved within the narrow scope of contract law, it is entirely unwarranted to open up the broad and fundamental issues petitioner unnecessarily raises.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

August 1957.